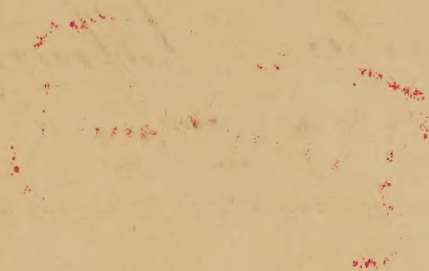


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GENTLEMEN OF THE JURY
REMINISCENCES OF THIRTY YEARS
AT THE BAR



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GENTLEMEN OF THE JURY

REMINISCENCES OF
THIRTY YEARS AT THE BAR

BY
FRANCIS L. WELLMAN

AUTHOR OF
"ART OF CROSS-EXAMINATION" AND "DAY IN COURT"

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W46

AFFECTIONATELY DEDICATED
TO MY FRIEND
AND COMPANION
E. W.

THE TWELVE

“As to the sanctity and foreordained character of the number twelve, and first as to their (the jury’s) number twelve; and this number is no less esteemed by our law than by Holy Writ. If the Twelve Apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try our temporal. The tribes of Israel were twelve; the Patriarchs were twelve, and Solomon’s officers were twelve (1 Kings IV, 7). Therefore, not only matters of fact were tried by twelve, but in ancient times twelve judges were to try matters in law. In the Exchequer Chambers there were twelve counselors of state for matters of state and he that appealed to the law must have eleven others with him who believe he says true and the law is so precise in their number of twelve that if the trial be by more or less than twelve it is a mistrial.”*

* “Duncomb’s Trials,” 1665.

FOREWORD

“Gentlemen of the Jury” *—I shall never forget the thrill that went through me when I uttered those words on my first appearance before a Jury of my Peers. It was in the Superior Court of the town of Dedham, Massachusetts. As so often happens, there was a long case on trial just ahead of mine, and I walked the winding, desolate streets of that monotonous town for five weary, exciting days, awaiting my turn to address the gentlemen of *my* first jury. Of course I could think of nothing but the eventful speech I was about to make. I went over it, again and again, until it became even a substitute for sleep. I was opposed by an old country lawyer who could probably call every member of the jury by his first name. When, at the end of that interminable week, I finally arose to “sum up” my case to the jury, the speech I had rehearsed so often had no application at all to the evidence in the case, as it had unexpectedly developed at the trial. I was compelled, however, to go through with it. I could think of no other aspect of the facts than the one I had laboriously learned by heart. There was a prompt verdict against me, although I shall always remain convinced that I had the right side of the case.

* In his delirium Lord Tenterdon’s dying words were: “Gentlemen of the jury, you may retire.”

I entered my second case with fear and trembling, which did not cease during the trial, but I was relieved in a measure when the Clerk of the Court told me that the presiding judge had sent for him after the case was ended and asked him the name of "the young lawyer who appeared for the plaintiff."

Since that memorable first day at Dedham I have tried probably more than a thousand cases before juries, and it is because of this somewhat unusual experience that I venture to write the following pages. I address myself to the tens of thousands of men that are called each year to serve their first term in the jury box.

Physicians are agreed that the best training for a doctor is to go through a severe illness, and I have always maintained that the best possible education for any law student, who is ambitious to become a court lawyer, would be to serve on a petit jury for at least three months. Thus he might learn the methods of thought and point of view of men similar to those he is later to argue before, and might at the same time observe the members of his own profession in the conduct of their cases. To learn how *not* to do it, to see himself as others would later see him, would be of inestimable advantage.

My object is to acquaint jurors with the profound importance and dignity of their membership in that ancient and honorable institution of Trial by Jury; to lay before them the duties, privileges and prerogatives of a juror, to open their minds to the fallacies of human testimony, the whys and wherefores of intentional perjury, the methods by which

truth can be distinguished from falsehood and exaggerations can be reduced to their proper proportions.

I wish to impress them with the dignity, wisdom and impartiality of judges, who at the same time, thank God, are human, and most of them blessed with a sense of humor. I shall endeavor to point out to jurors in some detail the methods by which the lawyers in the case often try to distort or conceal evidence, or to lead their minds to unimportant side issues in disregard of the major points before them,—the “tricks of the trade,” so to speak.

My efforts must necessarily be more or less reminiscent, and as wit, resourcefulness and repartee play a very considerable part in every successful trial lawyer’s career, I have tried to illustrate and substantiate my points by relating many amusing experiences in open court, as well as behind the scenes.

The world is already too full of moral lecturers and serious reformers; and while I trust my efforts may prove instructive to the uninitiated, my ambition is also to be hailed a welcome *raconteur*.

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GENTLEMEN OF THE JURY
REMINISCENCES OF THIRTY YEARS
AT THE BAR

CHAPTER I

A MIDDLE AGED MERCHANT'S FIRST EXPERIENCE WITH JURY DUTY

WHEN I arrived at my office one morning lately, I found lying on top of a pile of business letters an innocent looking slip of printed paper, which to my consternation I soon discovered to be a summons for jury duty in our Supreme Court for the coming week. All the railings of my numerous friends who had been obliged to sacrifice their business interests to the demands of these jury notices presented themselves forcibly to my mind, and here I was caught at last in the same net, although, by chance, for the first time during the twenty years I had been downtown.

What can I do about it? This was the one absorbing question of the day. Could I get up some affidavit of press of business, ill health, anything? Had I any friend who might know the Judge or the Clerk of the Court? Gradually I called to mind the different accounts I had read lately in the newspapers of the futile attempts to avoid jury duty by men situated like myself. Apparently, there no longer exists that stamp of political judge "to whose nod every man owed what he got, and looked for what he wanted."

At dinner that evening I happened to mention my dilemma to my wife. She promptly countered on me with the suggestion that she thought she remembered my telling her I had an important litigation of my own coming up in the courts next winter, which would have to be tried before a jury. "Supposing," she said, "every experienced business man should try to invent excuses so as not to serve as a juror; what kind of a trial do you think you would get in your own case?" My wife has a blunt way of putting things. Her remark suggested a new train of thought, and by morning I began to realize that after all I could not be called as a juror, in any event, oftener than once in two years, and probably not again for three or four years. Finally I concluded that I might as well become a "regular" citizen; let my own affairs go for a couple of weeks; try to look upon the jury system as "of the people and for the people;" and do by other business men as I would have them do by me were the situations reversed.

The following Monday found me at the court house promptly at the appointed hour. The court room seemed large enough for a regiment, but even so, it was crowded to suffocation. There must have been a hundred or more jurors present. These, together with the lawyers, law clerks and a host of prospective witnesses, not only occupied all the seats but all the standing room as well. Everything seemed to be in utter confusion.

Presently, a loud "Hear ye! Hear ye!" from the court crier ushered in a black-robed judge, preceded by his

attendant. Once on the Bench the judge began calling off a long list of cases, which somebody informed me was the Court Calendar. This gave rise to what seemed to be an endless succession of motions made by the lawyers or their clerks, requests for adjournments, etc. The judge patiently read affidavit after affidavit, and the whole proceeding was interminable and boresome in the extreme. The court room was getting hotter and hotter. I began seriously to regret my good resolution. As soon as this long calendar had been disposed of, at least fifty jurors, almost with one accord, rose from their seats and filed up to the Bench to present their "excuses." This occupied fully another half hour. By this time I was planning to pay the \$100 fine, or do anything to get out of that stifling court room.

Presently, however, the crowd began to fade away, and there were indications that the court room was being cleared for action. An open window had improved the atmosphere. I observed the clerk of the court fumbling in a ballot box, and after a loud, "Gentlemen, please take your seats in the jury box as your names are called," I heard my own name as the first victim chosen.

I had hardly stepped into the jury box and taken my seat in the chair ordinarily occupied by the foreman of the jury, before I began to feel something of the dignity and importance of my position. I felt I had suddenly become an integral part of the administration of justice in my own city, and would soon be called upon to decide important disputed property and damage questions arising out of the business

transacted by my fellow citizens. The thought flashed through my mind that here I was playing the rôle of juror with nothing but my own common sense to guide me; if only someone could have explained the matter to me a little I certainly would have had more confidence in myself at the start. Once the jury box was filled, the lawyers began telling us what the case was all about and asking questions as to our qualifications, first one side and then the other; and I was actually launched upon my first jury case.

At the table directly in front of the jury box sat a middle aged gentlewoman, dressed in deep mourning, and behind her two young girls, perhaps seventeen and nineteen years of age, who I presently learned were her daughters. At the further table I noticed a strong, handsome man in the prime of life. His hair was slightly grey at the temples, his face bore distinct marks of mental suffering, and there was a look of determination about him which made me feel that whatever the nature of the case might be, it was likely to be a fight to the finish. By his side sat a young woman, still in her twenties. She was rather small, very dainty and fragile. Her face was pale, almost ashen, but her glorious black eyes had such a hunted, pathetic expression that the jurors' sympathies were aroused in her behalf almost from the very beginning.

In their opening addresses the lawyers gradually unfolded for us the two opposite sides of a most dramatic and absorbing domestic tragedy.

It seems that the young woman who was already the center of attraction, at least so far as the jury was concerned, was an Italian by birth, but had been brought up and educated in England. When she was but sixteen years of age she had met and married the defendant, who at the time was attached to the American Embassy in London, and was popular among the social set that usually surrounds a foreign ambassador. The couple appeared to be ideally happy and made many friends in London; but presently the husband, who had been a lawyer before he had become attached to the Embassy, felt that it was time for him to return to America and resume his law practice in his native city. He was possessed of ample means through inheritance, but was ambitious to attain prominence in his profession as a stepping stone to political honors later on. Accordingly he and his young wife, Teresa, established themselves in a comfortable country house on Long Island, just outside the city limits.

He made amazing progress at the Bar, and he found his beautiful wife of the greatest use to him. She looked superb as she presided over a dinner party, and many a rich client was first attracted to her husband's law office by the charm of his wife at one of these social functions. Everyone was struck by her affection for her husband and congratulated him upon his good fortune.

One day the husband found himself victorious in a litigation of considerable importance against one of New York's leading trust companies. At the conclusion of the trial, but

before the jury had returned with their verdict, the president of the company, a Mr. Stiles, had taken pains to cross the court room to where the lawyer was seated and had congratulated him upon the skillful way he had handled the evidence. Stiles was an influential man in the "Street," whose praise was likely to kindle the aspirations of any young lawyer. That night at dinner he told his wife that at last he saw a chance to secure what all young lawyers strive for,—some part, at least, of the business of one of New York's large trust companies. He suggested inviting Stiles out to their home for dinner at the first possible opportunity, impressing upon her that he looked to her to make his visit so pleasant for him that he would be sure to come again.

It so happened that Mr. Stiles' wife was absent in Europe, where she had gone to see her two daughters who were being educated abroad, and he readily accepted the husband's invitation to motor out with him for dinner one spring afternoon and meet his wife whose beauty had already been recounted to him. A few minutes after their arrival Teresa, exquisitely dressed and with a bright flower relieving the ebony blackness of her hair, advanced to shake hands with the great financier.

"I have often heard of you, Mr. Stiles," she said, in her low, musical voice, "and it is very good of you to honor us with a visit."

"The honor is mine," replied Stiles, scrutinizing her closely, "but how much honor I did not appreciate until this moment."

"Then honors are even," she countered quickly with a laugh that hid a blush.

The husband was fond of commenting on his wife's marvelous tact, and openly acknowledged that she was the principal factor in getting him his clients. "Teresa makes every guest believe that she didn't really exist until she met him," was one of his favorite sayings.

She made herself particularly agreeable to Stiles at dinner that evening, and several times the husband smiled knowingly as he saw his beautiful wife's flushed cheeks quite close to Stiles' in order, as he thought, not to miss the point of some subtle witticism. Stiles enjoyed himself. The wife of his friend was a revelation to him. Her beauty and her conversation fascinated him.

When he had gone the husband took Teresa in his arms and kissed her gratefully. "You were magnificent," he said. "You have made Stiles my friend; now I am certain of success."

She nestled her face against his breast but did not speak, and the husband was too full of his own ambitions to notice that she never answered him. Hitherto she had been accustomed to confess gleefully that she had flattered their guests shamelessly just for his sake. But the tragic truth was that when Teresa had looked for a fraction of a second into the strong, imperious face of the great bank president she had lost her soul. The following evening, after dinner, Teresa remarked to her husband that she had forgotten to tell him Stiles had called and left some flowers for her that afternoon,

in appreciation, she supposed, of the dinner invitation. "But he is so ugly," she pouted.

Later on they both dined at Stiles' town house. An invitation to afternoon tea found the husband in court, but Teresa accepted. She did not tell her husband, however, that it developed into a long ride in the country, during which they had each confessed their irresistible attraction for one another, and Stiles had avowed his willingness to forego everything in life in exchange for Teresa's heart and companionship.

Stiles' frequent visits to Teresa's home soon started the tongues of gossips. Quiet hints were even thrown out to the husband, which he dismissed with a contented smile. No doubt he was thinking how little his friends knew of the devotion of his wife and business assistant, and was saying to himself, "They do not know she is doing it all for me."

One day he reached his home and found his wife absent. It had never occurred before, as she was always at hand to greet him. In a few moments she appeared looking so exquisitely radiant that he failed to notice the trembling of her hand or the unnatural flush of her cheek. While her husband praised her for the trouble she had taken in winning Stiles as her friend, her conscience was whispering that she had done it all spontaneously because Stiles had by a single look captured her imagination. The color in her cheeks and the light in her eyes had not been assumed; both were real and both were evidence of the terrible change a single evening had wrought in her.

After dinner she complained of an unusual weariness and excused herself early to go to bed. The husband sat in his library dreaming over his cigar, of his ambitions, of his rapid advancement in his profession, and of his beautiful helpmate, until to his surprise it was almost midnight. He had not noticed that his wife, as was her custom, had failed to call to him that he was keeping her awake. As he went to look for a law book he was to take to town in the morning, he noticed a plain envelope on the hall table, unstamped and addressed to himself. It contained an anonymous communication warning him that his neighbors thought it high time he should know that his wife was meeting a prominent banker every afternoon at a house numbered 8 East 50th Street; that if the coast was clear there was always a signal hanging from the second story window,—and much more in the same tenor.

He could not, would not believe it. It was the work of some village jester—the work of a devil. As he went to his bedroom and saw Teresa asleep, her lips parted almost in a smile—a perfect picture of beauty and happiness—he attempted to banish the whole thing from his mind. He could not sleep, however, and in the morning he was gray and haggard. His wife did not seem to notice his condition, though formerly any appearance of illness was a matter of much solicitude on her part.

Upon reaching his office his first plan was to secrete himself and watch the house on 50th Street. This idea he dismissed as undignified and lacking in chivalry. He could

not resist the temptation, however, to direct his clerk to ascertain the name of the owner of No. 8 East 50th Street. When his clerk returned and announced casually that Mr. A. A. Stiles was the recorded owner, the husband dropped the papers he was studying and rushed out of his office and to his home.

He found his wife just starting for a drive. He ordered her into the house and made known to her the contents of the anonymous letter and his own suspicions. Teresa denied emphatically all his accusations; protested that Stiles was a mere friend and that there had been no love making. But under his cross-fire of questions and her own self-contradictions, she finally sank to the floor and laid bare her soul. She told how Stiles had hypnotized her from the moment of their first meeting and how he had played upon her feelings until she was unable to deny him anything.

"Give me back my wedding ring and go at once wherever you will, but out of my house," was all the husband found himself able to say.

For three days he sat brooding in his library. The fourth day being Sunday he knew that he could find Stiles at his uptown club. He armed himself with his pistol, and paraded the street in front of the club entrance all the morning until Stiles made his appearance, and then without a word he walked up to him and shot him dead.

Although Stiles in his position as president was the recipient of a very large salary, yet it was his custom to spend it

all each year upon the comforts and education of his family, and at his death his wife and two daughters found themselves practically penniless, and without even money enough to supply the bare necessities of life. Accordingly the question we, as jurors, were called upon to decide was how much, if anything, it was proper that the defendant—the lawyer husband—should pay out of his own meager fortune as recompense to the next of kin of his victim in consequence of the assault resulting in his death.

The trial, from start to finish, was full of the most dramatic incidents. Throughout the widow sat, almost motionless, so near to us all that at any moment the juror in the fourth seat could have laid an outstretched hand upon her shoulder. She had, of course, known the major facts leading up to the assassination, but as day by day the witnesses testified to the details of her husband's infatuation and infidelity, the pallor of her cheeks seemed to me to deepen, and her attitude of hopeless despair became more and more marked. She had evidently both respected and loved the father of her lovely young daughters and the provider of their comfortable, luxurious home.

The husband, on the other hand, maintained through it all the stolid rôle of a martyr, who had simply avenged himself upon the man who had wrecked his home. "I would do it again," was the dominant note of his testimony. By this act he had made other men's homes more secure.

Never will any of us forget the dramatic day that the young wife spent in the witness chair. Nothing could be

more pathetic or heartrending. No theatrical performance could have a fraction of its interest or thrill. She freely admitted her own part in the absorbing drama. She made no attempt at concealment or mitigation. She had been a happy wife until this infatuation for a bigger, more human man had simply swept her off her feet. She told how her wifely duties had suddenly become irksome to her, her home a prison; how she had fought and prayed against her inclinations, and had tried to remain a dutiful wife. Under the pressing questions of the lawyers she admitted the generosity of her husband in forgiving her and taking her back to his home, but was forced to confess that all the joy of life had died with her lover.

It was her testimony that had saved her husband from the electric chair, for she had made the same sad confession to the jury in the criminal trial, and here she was again taking all the blame upon herself in his behalf, unbosoming the tragedies of her heart to a crowded courtroom. The expression of her face throughout that long, trying ordeal, was the most pathetic thing I have ever witnessed. She excused herself in nothing; she accused no one; she had fallen a prey to Fate; her undoing was complete.

Finally the trial came to an end. The arguments of counsel and the dignity and clearness of the judge's charge struck home. My ideas of our courts and jury trials, gathered mainly from the newspapers, underwent a complete change. No proceeding could have been more orderly or impressive.

Once in the jury room, we were all so eager to commence our discussion that we hardly noticed the bareness of our ill-ventilated quarters where twelve men seated around a long table must, like so many human dice, all come up one way or there can be no verdict. As I had sat with my back to most of the panel during the trial I had not until now had a chance to study the faces of my associates. It was apparent that although we had evidently come from many different stations in life, yet if we were all mingled together and divided by twelve we would come out just about an average present day New York citizen.

If we were to agree upon a verdict the one thing to avoid, it seemed to me, was anything in the nature of taking sides at the start for or against the husband or the widow. I had presided at committee meetings often enough to realize that once we openly paired off, as it were, creating a majority as opposed to a minority, the chances of our coming together would be greatly diminished. As foreman I therefore suggested a secret ballot to determine how we stood as a whole, but not as individuals. The count was six to six. We were equally divided; only half of us wanted to give the widow any verdict at all. My own convictions were strongly in her favor. Whatever might be said for or against the other participants in the drama, the widow and her daughters stood out in my mind as the only ones we could all agree upon as the innocent sufferers, and I was determined to bring about a verdict in their favor if it were humanly possible.

Accordingly I suggested that we all try to avoid anything

savoring of a heated discussion. Let us all remember that each individual juror's opinion is as valuable as any other's, and let us endeavor to reconcile these opinions by a friendly discussion of the evidence. All readily applauded this suggestion. But one man quickly brought his fist down upon the table with the assertion that as far as he was concerned, nothing could persuade him to a verdict against the husband.

"In his place I would have done just as he did. I think any husband has the right to kill any man who seduces his wife and breaks up his home."

"Hurrah for that sob stuff," said a young juror, "but since when and by what law is adultery punishable with death?"

"By the 'unwritten law,'" replied the first speaker.

"The unwritten law! You mean, I suppose, the law put into an imaginary statute book by hysterical, lopsided juries who try to make laws to suit themselves. There's only one kind of law, and that's the *written law*. There's no such thing as *unwritten* anything in the law."

The discussion seemed to me to be getting into a channel which could only end in a general row, when fortunately one juror fairly shouted: "Say, friends, what's the use of our kidding ourselves? Let's be honest about it. Is there a man on this jury who wouldn't have fallen for that girl himself just as Stiles did, if he had been given the same opportunity and the girl had fallen for him?" This remark was followed by a hearty laugh all round and things looked a little brighter.

I turned to our home loving friend and assured him that I shared his feeling for the protection of his fireside as an abstract proposition, but did he not feel that circumstances, perhaps, might alter the situation in some cases? Did he think the husband in this case was entirely blameless? Was there not abundant evidence in the case that he had thrown the banker, so to speak, into the arms of his wife? When he brought Stiles to dinner that first time, had he not especially urged his wife to make much of him so that he would send them his law business? When a man deliberately uses his wife to advance his own business, and even spurs her on, is he entirely blameless for the consequences? Did he think this a proper thing for any lawyer to do?

This slant to the argument seemed to make some impression. Presently a hitherto silent juror spoke up. "Even so," he said, "I grant the force of what you say, but a man must protect his home in some way or other, and what else could this husband do, after receiving his wife's confession, but seek out and kill her seducer?"

"Was it necessary to kill him?" I suggested. "If he really loved his wife, was it necessary to expose her guilt to the world by committing murder, which could only result in a public trial where all the details of her seduction would be broadcasted by the newspapers throughout the country? Was there no other way out of the dilemma? Was not his own desire for mere revenge so great that he was willing to sacrifice the wife he was supposed to love and bound to protect?"

"If the revelation of her love for Stiles was so great a shock that he felt he could not go on living under the same roof with his wife, why not send her to her home in Italy for a period of time and let the excitement die down sufficiently to reveal what his true feeling for her was? Maybe he could find it in his heart to forgive her, as apparently he had in fact done, for they seemed to have become reconciled. He could very properly have gone to Stiles and have told him that he knew of his perfidy; he could have forbidden him further communication with his wife, even threatened him with violence if he saw her again; but why take the law into his own hands? 'Thou shalt not kill.' Has anyone but the giver of life the right to take it away?"

"That's all very fine and dandy," suggested the first juror. "That argument would put an end to all wars. Do you mean to suggest that a man hasn't the right to kill his fellowman in protection of his country, and, if in protection of his country, why not of his own hearthstone?"

At this stage of the proceedings another juror broke into the discussion with the suggestion that a Frenchman would have solved the problem by seeking out his wife's lover and picking a quarrel with him over a game of cards or on some entirely different subject, and would have then proceeded to fill him full of bullets, thus avoiding all necessity for the "*cherchez la femme*" business, as he put it.

"That's all very well," replied the first juror, "but in that event the husband would have lost his most compelling defence, and would probably have landed in the electric chair."

This gave me an excellent opportunity to suggest the query whether, after all, the defendant, being a lawyer, had not thought the whole thing out during the three days he sat closeted in his own library before the shooting, and whether he had not deliberately decided to hide behind his wife's skirts. There was no heat of passion behind the killing. He had brooded over it for days; he had had ample opportunity to realize his own mistake in goading on his wife to obtain business favors for him with his men friends. He must have weighed all the consequences to himself before he deliberately sought out his victim. Was it not evident, therefore, that he knowingly selected the method most likely to react in his own favor although it would utterly destroy the reputation of his wife, and did this thought entitle him to any morbid sympathy or consideration from us?

I was prepared to admit the soundness of all the arguments I had listened to, but suggested mildly that it seemed to me that in this particular case we were forgetting there were *two* homes that had been affected by this tragedy. "Because one man breaks up the home of another," I argued, "does that fact give that other the right to wreck a second home by way of revenge? When we come to think of it, didn't the husband invade the banker's home by killing him; and didn't he destroy the happiness of the widow and her children quite as effectively as his own had been destroyed? Do two wrongs make a right? As a matter of law he certainly had no more right to hit him with a bullet than he had to hit

him with his automobile. If he died from either assault the husband should clearly be held liable for the consequences."

I now felt I was fast winning votes to my side of the argument, and that the time had come to play my trump card by an appeal to sympathy for the one and only really innocent person in the whole affair. "After all," I continued, "has the widow done anything that could justify criticism by anyone? Wasn't she the only innocent sufferer?"

There was at least one juror still against her, for he asked me to answer him, "What was the necessity of bringing up the whole painful affair a second time in the courts; why not keep the daughters in ignorance of the true facts leading to the death of their father?"

"For the simple reason," I replied, "that there was no alternative. By the assassination of her husband she and they had been deprived of his support and had been left practically penniless." Did my friend mean to suggest that it was now the widow's turn to take the law into her hands and shoot down her husband's assassin, or would he not prefer that she should avail herself of the only legal remedy she had, and compel the defendant to make good to her, so far as he could, the loss she had sustained in dollars and cents?

The judge had instructed us that the measure of damages was the value of the human life estimated in view of his age and earning capacity. He was fifty years old and was earning a salary of \$100,000 a year, and according to the

insurance tables had a life expectancy of twenty-three years. That amounted to \$2,300,000. Obviously we could not award that absurd sum and the discussion gradually shifted to the amount of our verdict, if we should finally decide upon one. One juror suggested that if we turned over to the widow the amount of money in securities the evidence had led us to believe the defendant had inherited or accumulated, we would be doing all that was practically possible to recompense the widow for her financial loss. This same juror argued it in this wise:

“My view, gentlemen, is that the defendant has evidently taken back his wife. To that extent, at least, his home has been restored. Now, supposing we take away his property and let him start his career all over again? How could we arrive at a more common sense just verdict than by transferring this property to the possession of the widow in exchange for the loss of her own bread winner?”

Nobody made any reply to this suggestion and I saw that the time was approaching to take another vote. I must gain time for our minds to cool down; so I abruptly changed the subject and told the jury how much I had regretted the necessity of serving as a juror at all. One man spoke up and said he had tried to get off by telling the judge that he had served in the army for two years in France. “Evidently your duties to your country are not yet over,” was the judge’s sardonic reply. Another man said he had told the judge that if he stayed away from business for two weeks his employer would discharge him. “Telephone down to your

employer and say to him that I will take him in your place!" was all the comfort he got.

All of the jury seemed particularly interested in what the lawyers were going to get out of the case compared to our three dollars a day. One juror jokingly suggested that it was safe to wager that the plaintiff's lawyer, to whom we all had taken a fancy, would hate to report his fee to the Income Tax Department, for as the widow did not have a cent she could not have paid him anything at all! We were all agreed that the defendant's lawyer was out for the money and would "never set the Thames afire unless he had first insured it!"

This bantering soon led to a story of Sergeant Davy who, when he was called to account for taking silver from a client and so disgracing the profession, replied, "I took silver because I could not get gold, but I took every farthing the fellow had in the world, and I hope you don't call *that* disgracing the profession!"

One of the jurors who had hardly opened his mouth during the entire discussion of the evidence suddenly woke up and told us a witty story he had read about an occasion when Abraham Lincoln was defending a case of assault and battery not unlike the one we were serving in, and where it was proved that although the plaintiff had been the aggressor, the opposing counsel argued that the defendant might have protected himself without inflicting serious injury on his assailant.

"That reminds me of the man who was attacked by a

farmer's dog, which he killed with a pitchfork," commented Lincoln.

"What made you kill my dog?' demanded the farmer.

"What made him try to bite me?' retorted the offender.

"But why didn't you go at him with the other end of your pitchfork?' persisted the farmer.

"Well, why didn't he come at me with his other end?'"

Now was my time to call for another ballot; we were all in a jolly mood, and no one would feel he was sacrificing his opinion to a majority. The ballot proved we were all of one mind. But I refrain from stating what our verdict was in order that each of my readers may decide that question for himself. Suffice it to say, that after receiving our verdict the judge complimented us upon what he termed our very intelligent decision, and as we had served for seven consecutive court days, he excused us from further jury duty for the balance of the term.

As I left the courtroom and walked down to my own office, I was conscious of a sense of keen disappointment that my court duties had come to an end and that I must take up, once more, the tedious, monotonous routine of my own business affairs.*

* While the facts above narrated are for the most part imaginary, let no prospective juror believe that he may not be called to serve upon an equally dramatic and absorbing case. The truth is that the circumstances set forth bear a striking resemblance, in some respects, to those leading up to the trial of Daniel Sickles for the murder of District Attorney Philip Barton Key, which took place sixty years ago in Washington, D. C. See "Dramatic Days at the Old Bailey," by Charles Kingston.

CHAPTER II

HISTORY OF TRIAL BY JURY

To any citizen who has had an experience similar to the one narrated in the previous chapter I fear that what I have to write will make but slight appeal. He has served his "term" in the jury box. He has handled his first pack of cards and feels that he already knows the rules of the game and hardly considers it necessary to read any book on the subject. He might even resent the suggestion that there was anything more for him to learn about the matter.

The records of the Commissioner of Jurors, however, show that last year (1923) in the Greater City of New York there was a daily average of 58 courts trying jury cases, and that 104,879 citizens were summoned as jurors. Of this number 58,824 individuals actually served in cases. From these accurate figures it is not difficult to estimate the hundreds of thousands of jurors who are summoned to duty throughout the United States each year. A large proportion of these jurors have never been in court before and know nothing whatsoever of jury duty. It is to such as these that I make my appeal.

If I am met by the suggestion that the trial described in the previous chapter has more of human interest than the

every day litigation juries are called upon to decide, my reply will be that, in my experience, nearly every lawsuit that is tried before a jury develops some human side that cannot fail to arouse a corresponding interest in the jury box. Whenever one is selected to umpire a contest of any nature whatsoever there is inherently a responsibility and a thrill about the task.

Mr. Juryman, if you are willing to take your seat in the jury box as such an umpire, even if it is for the first time, and try to realize that you have thereby become an important part of the administration of the law by which you yourself as well as all the rest of us are governed; if you are willing to become a member of that centuries old, historic institution, known as Trial by Jury, universally considered the very bulwark of our system of jurisprudence; if you are open minded and desirous of obtaining all the light you can upon the duties and privileges of a juror, to the end that you may observe your oath of office and do justice to all litigants who come before you; if you desire to learn how to sift and weigh evidence given by witnesses, to know how to judge of their motives, to make allowance for their prejudices; if you wish to understand something of the fallibility and unreliability of human testimony, and finally if you desire to be able to recognize the legitimate as well as the unprofessional methods by which the lawyers in the case will try to work upon your sympathies and excite your prejudices, distort and becloud the evidence; if you have no axe to grind and are just an honest, natural human being, willing to look upon the jury

as "a great popular university," which has done a large part to perpetuate democracy and to train our citizens in the art of self-government,—then I assure you that if you will read on, I can convince you that when you are sworn as a juror you will be entering upon one of the most fascinating, instructive, emotional and amusing experiences of your life.

There have doubtless been a large number of brilliant trial lawyers at the American Bar during the last century, but among them all the name of Choate seems to me to stand out most prominently: Rufus Choate, the "Wizard of the Twelve" in Massachusetts, and later on his nephew, Joseph H. Choate, the "Idol of the New York Bar." Both were veritable geniuses as trial lawyers and they were both consummate believers in trial by jury as the very best possible means of deciding the questions of fact that ordinarily arise in litigations.

I know of Rufus Choate, the inspiration of my student days, only through his enthusiastic biographers, but I came in close contact with Joseph Choate, having been opposed to him in the Federal Courts in litigations lasting several weeks at a time. I can bear witness, therefore, to the fact that even his opponents were so overwhelmed by the charm and subtle art with which he handled his jury that they almost forgot the pangs of defeat. Mr. Choate was the highest type of an American gentleman. As a *raconteur* and after dinner speaker, he had few equals; as our ambassador to the Court of St. James he was admired by everyone; as an



JOSEPH H. CHOATE

advocate before a jury he was literally inspired. In my opinion he was not only the foremost trial lawyer at the American Bar, but, with apologies to my many able contemporaries, he was so far ahead of us all that there was even no second.

Let me call your attention to his opinion of trial by jury, delivered before the American Bar Association in 1903, at the time when he was at the very zenith of his professional career:

“The truth is that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of liberty and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share in maintaining their wholesome interest in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and education in the law to the profession itself, and is so embedded in our constitutions, which declare that it shall remain forever inviolate, requiring an amendment to alter it,—that there may be no substantial ground for fear that any of us will live to see the people consent to give it up. I cherish, as the result of a life’s work now nearing its end, that the old-fashioned trial by jury of twelve honest and intellectual citizens remains today, all suggested innovations and amendments to the contrary, the best and safest practical manner for the determination of facts as the basis of judgment of courts, and that all

attempts to tinker or tamper with it should be discouraged as disastrous to the public welfare."

I came across a statement in Mr. Justice Miller's "Trial by Jury," written after twenty-five years' experience as a judge in the United States Supreme Court, which cannot fail to interest the legal profession as well as that considerable body of reformers who are ever trying to meddle with our jury system. In contrasting favorably the results of trials by jury that had come under his observation from all the Courts of the United States for review, with his experience among the judges in his own court, he makes this significant comment:

"I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement on questions of law and how often they disagreed upon questions of fact, which, apparently, were as clear as the law."

Every merchant after years of toil in his own line of business takes a natural pride in being able to print under his firm name some such words as, "Established in 1850." Even if the business has been inherited from a long line of ancestors the feeling is there just the same. These words are the insignia of solid worth, of respectability, of having been tried in the balance, as it were, for all those years and found reliable and trustworthy. So it is with the institution of trial by jury, of which I am persuading you to become an active member. There is this difference, however, for trial

by jury is centuries old, between six and eight centuries to be more specific, and has been used by English speaking people in one or another department of their public affairs ever since the Norman Conquest.

It was subjected to the severest possible tests during the reign of the Tudors and the Stuarts; and the courage of juries in those days, when the influence of the royal prerogative was at its height and the royal will and desire attempted to carry the day against all opposition, won for the petit jury much of its prestige and glory in English history. The effective barrier it presented against the wrath and tyranny of kings I am sure will excite your interest and admiration when we come to that part of our story, for I assume that it may interest you to know something of the history of the dignified institution you are joining: its origin and gradual development to its present state of perfection, although all human institutions must necessarily be more or less imperfect.

Regarding what follows I wish to disclaim even the slightest originality of research, or, in some instances, even of expression. I am simply trying to condense in readable form the dozens of musty old volumes of ancient historians and ancient as well as modern law professors, over which I have spent weeks and weeks of patient study.

Even these learned historians cannot agree among themselves about the origin of trial by jury: whether we owe it entirely to the Greeks and Romans; whether it was of Anglo-Saxon or Norman origin, or what not. So why should you

and I worry? Suffice it to say it is of a ripe old age. All governments and all nations seem to have played at it in one form or another, enlarging it and tinkering with it and moulding it into its present form, which there can be no doubt is the outcome of English civilization. How this process was wrought from a crude, unworkable beginning—the gradual evolution of the present system—cannot fail to excite the interest of the reader or to impress him with the supreme dignity of our modern jury trial, if for no other reason than that it has taken generation upon generation to mould it into shape. And then it may be some satisfaction to a juror to realize that he knows far more about the history of the “twelve men” sitting with him in the jury box than nine-tenths of the lawyers who may appear before him in any of our courts, either on the civil or the criminal side of the law.

After the bloody reign of the Stuarts came to an end, gradually there arose a more liberal conception of popular courts of justice and trial by jury began to assume many of the characteristics and safeguards of our present system. It is interesting to note that ever since that time the constant efforts of the experimental theorists and sagacious legislators to limit or mutilate it have been in vain. The system was so valued by the people that no conquest, no change of government, no attempted upheaval of public opinion could ever succeed in abolishing it.

Strange to say, the Romans, in the time of Justinian, had adopted a system of trial by jury which differed in no essen-

tial from our own, excepting that every jury contained one or more lawyers who were supposed to guide their fellows on questions of law. It is stranger still that the enlightened idea of procedure and evidence which prevailed in Rome should not have survived. But we find in the Middle Ages that every trace of the original trial by jury had disappeared, and for centuries the Anglo-Saxons and Normans floundered through the same barbarous experiences as the ancients, out of which the Roman trial by jury had sprung.

Professor Thayer likens the primitive courts of the Anglo-Saxons to a New England town meeting, and it is worthy of note that the *people* were admitted into a share in the administration even of such crude justice as then prevailed. The Anglo-Saxon and Norman courts consisted of calling together at first one hundred of the heads of families, summoned from any neighborhood where a dispute had arisen. Later the number was reduced to twelve. No evidence was taken; there were no judges and no witnesses outside of the twelve family heads who were summoned as jurors because they were in fact witnesses, or at least had some knowledge of the dispute in question.

It was practically a one-sided proof. There was no testing by cross-examination; *the prevailing thing was the oath itself*. The solemnity of an oath was implicitly believed in by the Anglo-Saxons. When the accused was a person of known probity, that is, "oathworthy," his own oath was sufficient to clear him. But if the accusation against him was supported by the oaths of many others, he was required to

bring forward his friends to support his oath. These people were called "compurgators" and the number required was twelve, the party accused and eleven others who swore to his credibility.

It stands to reason that in those primitive days there was plenty of opportunity for a man's neighbors to know all about his character and reputation for veracity, and the declaration of his neighbors concerning his credibility could, of course, be received with no little confidence. On the other hand, no one could be put on trial except by the sworn testimony of his neighbors, who acted as his accusers. Blackstone, in his celebrated "Commentaries," of which by the way more copies were sold in America than in England when it was first published, gives the following description of a trial by compurgation:

"Hear this, ye Justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof in any manner and form as the said Richard hath declared against me, so help me God!' Thereupon, his eleven neighbors or 'compurgators' shall avow their oaths that they believe in their consciences that he saith truth. His credit in court depended upon the opinion his neighbors had of his veracity. This gradually led to the practice of allowing the other side to select witnesses from which the defendant must choose his eleven and if he failed he would suffer the 'ordeal' to save himself. The 'compurgators' who were so unfortunate as to support a losing cause were punished as perjurers, and one hand was cut off, although later, the

law allowed the redemption of the hand by the payment of a fine!"

The criminal law of England in those days was as cruel and as brutal as any criminal law that has existed since the world began. At the time that Blackstone wrote his "Commentaries" the number of statutory offenses punishable by death was not less than one hundred and sixty, and in a great majority of cases the punishment obviously did not fit the crime. This led to a practice whereby humane judges quashed the indictments on the most absurd technical grounds and assisted the juries to acquit where they could discover no other means for avoiding unjust sentences.

In criminal cases there were two modes of trial for the defendant who denied the charges against him. The party could purge himself on a first offence by his oath and the oaths of certain of his neighbors as compurgators, who swore that they knew him, and that they believed he spoke the truth in denying the offence. This amounted to an acquittal. But if it was not his first offence, or if his compurgators did not agree to make the necessary oath, he was put to the "Ordeal," or God's judgment of fire or water. Of these judgments the "Ordeal" of fire or hot iron was applied to noblemen and freemen as being the more honorable and more easy; the "Ordeal" of water was reserved for persons under the rank of freemen.

The "Ordeal" was regarded as a religious rite. It was conducted by the priests in the parish church, and the intervention of Providence was thus assumed to be secured on

behalf of the innocent. To accomplish this result, the party charged was handed over to the church to be prepared by prayer and fasting for the trial he had to undergo. After three days' preparation, he was brought into the church by the priests, and stood in the presence of his accuser, each party being accompanied by friends not exceeding twelve in number. Prayers were offered up that Heaven would interpose on behalf of the innocent. The accused, if the "Ordeal" was by hot water, then plunged his naked hand or arm, according to the gravity of his alleged offence, into a bowl of boiling water, and picked out a stone which was suspended therein; in the former case to the depth of a man's hand, and in the latter to the depth of a cubit. If his hand or arm came out uninjured, it was assumed that Heaven had worked a miracle to declare his innocence. If, on the contrary, his hand or arm was injured by the water, he was held to be guilty. In the "Ordeal" by cold water he was, after three days' fasting and preparation, tied with his thumbs to his toes, and in this condition was thrown into a stream. If he sank he was innocent; if he floated he was guilty. Before, however, this was done, the accused was given holy water to drink, and the priest addressed the stream, abjuring it in the name of the Almighty who first created the water; by the baptism of Christ in the waters of Jordan; by His walking on the water; by the Holy Trinity, by whose will the Israelites passed dry-footed over the Red Sea, and at whose invocation Elisha caused the axe to swim, not to receive the accused if he were guilty, but to make him swim upon it.

In the "Ordeal" of hot iron, after the accused had been similarly prepared, the fire was brought into the church, after which no one was allowed to enter but the priest and the accused. Nine feet were then measured from the fire to a mark, being nine times the length of the man's foot. The iron, weighing from one to three pounds, according to whether it was the single or the threefold "Ordeal," was then laid upon the embers where it remained while the mass of judgment was performed. The hand of the accused was then sprinkled with holy water and he took the hot iron. With this he walked the prescribed nine feet, then he threw down the iron and went direct to the altar where his hand was bound up by the priest. After three days the bandage was removed in the presence of all parties, and his guilt or innocence depended upon the appearance of his hand. If the wound was clean, he was innocent; if impure, he was guilty.

By another method the supposed culprit walked between red-hot ploughshares a foot apart, and by another, the accused was given a piece of bread from the altar. If he swallowed it, well; but if it stuck in his throat, he was guilty. Another mode was to blindfold the accused and make him select from two pieces of wood, one being plain and one marked with a cross. If he chose that which bore the cross, he was free; but if he chanced on the other, he was guilty.*

The Normans introduced into their legal system a Trial

* "The King's Peace," F. A. Inderwick.

by Combat or Duel. The criminal was presented for trial and punishment by the general accusation of his neighbors, and any accuser was obliged to support his charge by personal combat. But if any one was suspected and nobody dared to act as his accuser, then twelve of his neighbors were summoned, and they consigned him to undergo the "Ordeal," which was accepted as a decisive test of his innocence or guilt.

Many writers maintain that the development of the jury system made headway in England largely because of the fact that this method of Trial by Duel or Combat became so hated and burdensome that the "Ordeal" itself became more and more widely extended. Hence, a generation later, when the "Ordeal" was finally abolished, the new method of trial by jury swiftly emerged into its present form, excepting that the juries were still permitted to use their own personal knowledge of the facts as an aid to their verdict. Even up to the time of Edward I, called the English Justinian and rated by some the "wisest king that ever reigned," personal knowledge of the facts on the part of the jurors was still the necessary qualification for their office, and it was not until many years later that the jury assumed any other character.

In this same reign the process of "attaint" came into existence. This penalty of attaint was the ancient system of punishing jurors for any misconduct, such as rendering a false verdict, and the punishment proceeded on the theory that the jurors had perjured themselves, for they were still

looked upon in the light of witnesses. For a long time punishment by attaint was the only way of remedying a false verdict. The convicted juryman lost all his movable goods to the king. He was also imprisoned for at least a year and became infamous, that is, he could never serve on another jury, and his oath would never be accepted on another case. Oftentimes, also, the jurors' wives and children were turned out of doors and their lands confiscated. But it may be some consolation to know that the judges also were sometimes punished for errors in law, and occasionally even they had to defend their judgments by the "Duel." The attaint was in full force in the fourteenth century.

In criminal cases, jurors were summoned before the Star Chamber and fined for verdicts of acquittal and contrariwise. Even in Queen Elizabeth's time a juror was not only imprisoned, but heavily fined, for pronouncing a man guilty of treason contrary to what was considered to be the evidence in the case. Attaint gradually came into disuse, and the granting of new trials when the juries found against the evidence was introduced. It may be reassuring to present day jurors to know that in 1625 attaint was abolished altogether, and that very few instances of punishment by attaint were recorded in the books later than the sixteenth century.

With the downfall of the Stuarts the Star Chamber itself was abolished and the pernicious doctrine that jurors could be held punishable for conscientious action was no longer in force. But the historians say that in the Middle Ages in England there was a great deal of perjury, and there were

many false verdicts among juries, so that it was found necessary to adopt most drastic measures to control these verdicts. Indeed, the jury system turned out to be a very poor guaranty of personal safety in England in the time of James II and Charles II, although it existed in precisely the same form and character as at the present time.

His Majesty's judges were then his most obedient servants and made haste to gratify the King's wish by practically repealing the laws which they were appointed to enforce. In those days, there lived such judges as the "Bloody Judge Jeffreys," the Lord Chief Justice of England, and later Lord Chancellor, and Lord Braxfield, of the Scottish Court. Of them I write in detail in a later chapter. Nothing can be found in history more brutal than the conduct of these judges, both toward the unfortunate criminals who came before them and toward the jurors who sat in their cases, and who came entirely under their dominion.

Lord Chief Justice Cochran, writing of Lord Braxfield, says: "It is impossible to condemn his conduct as a criminal judge too gravely or too severely; it was a disgrace to the age. A dexterous and practical trier of ordinary cases, he was harsh to prisoners, even in his jocularities, and to every counsel whom he chose to dislike. It may be doubted if he was ever so much in his element as when tauntingly repelling the last despairing claim of a wretched culprit, and sending him to the gallows with an insulting jest."

Lord Campbell called him the most execrated judge in the annals of Scottish jurisprudence. Nevertheless, upon the



LORD JUSTICE BRAXFIELD

principle of *de mortuis nil nisi bonum*, one of his professional rivals wrote of him after his death, "He discharged his duties with a manly firmness of mind, well tempered intrepidity of conduct, and a wise and faithful appreciation of the law, that must make his memory ever be gratefully remembered by his country." There can be no possible doubt, however, that where politics was concerned, it was impossible to look for justice to any of the Scotch judges. "Bring me prisoners and I will find you law," was one of Lord Justice-Clerk Braxfield's favorite sayings.

Perhaps, not to be outdone by these ancient Scottish and English judges, an amusing example of old time methods even in our own country may be quoted. I find it recorded of one Judge Williamson of Texas, familiarly called "Three-legged Willie," who was one of the very early judges of that state, that in his court one day a lawyer by the name of Charlton stated a point of law, whereupon the court refused to be convinced by the counsellor's statement. "Your law, sir!" said the judge. "Give us the book and page, sir."

Charlton: "This is my law, sir," pulling out a pistol, "and this, sir, is my book," drawing a bowie knife, "and that, sir, is the page," pointing the pistol toward the court.

The court: "Your law is not good, sir. The proper authority is *Colt on revolvers*."

At that he brought a six-shooter instantly to bear on the head of the counsellor, who dodged the point of the argument and turned toward the jury.*

* "Bench and Bar," H. L. Byloe.

There was another English judge, a Mr. Justice Scroggs, who was looked upon with even more loathing, if not more indignation, than the celebrated Jeffreys. Lord Campbell gives an account of the trial of Staley, the Roman Catholic, who was one of the first of what Campbell terms "Popish plot judicial murders, more disgraceful to England than the execution of St. Bartholomew is to France."

Staley was tried at the Bar of the Kings Court, and Judge Scroggs is reported to have repeatedly put questions to the prisoner attempting to intimidate him or to involve him in contradictions. A witness having stated that he had often heard the prisoner say that he would lose his blood for the King, and had heard him speak as loyally as man could speak, the judge merely exclaimed, "That is when he spoke to a Protestant."

After the verdict of guilty had been returned Scroggs addressed the prisoner: "Now you may die a Roman Catholic; you may harden your heart as much as you will and lift up your eyes—all that between your God and your conscience. My duty is only to pronounce judgment upon you according to law. Go! You shall be drawn to the place of execution where you shall be hanged by the neck and cut down alive." It is recorded that the friends of this unfortunate man were allowed later to give him a decent burial. But because they said a mass for his soul, his body by order of the judge was taken out of the grave, his quarters were fixed upon the gates of the city and his head on the top of a pole was set upon London Bridge.

This same judge lived to an old age, a solitary, selfish bachelor. He died without a relative or friend to close his eyes, the undertaker and the sexton being the only attendants at his funeral. It is said that he left no descendants, and that he must have been the last of his race, or else his relations were so ashamed of their connection with him that they changed their name. Ever since his death there has been no "Scroggs" in Great Britain or Ireland. The word was used, however, for a long time thereafter by nurses to frighten children, and Lord Campbell says that as long as our history is studied, or our language is spoken or read, the name of Scroggs will call up the image of a base and bloody-minded villain. "Albeit, he could both speak and write our language better than any other lawyer of the seventeenth century, Francis Bacon alone excepted."

One of the most celebrated trials in the latter part of the sixteenth century was the Throckmorton case (1 How. St. Tr.). The accused was put on trial for treason and asked that one John Fitzwilliams present himself as a witness. The prosecuting attorney begged the court to have nothing to do with him, and not even allow him to be sworn, whereas Throckmorton inquired of the court: "Why should he not be suffered to tell the truth? And why be ye not so well contented to hear truth for me as untruth against me?" Whereupon the Master of the Rolls censured the witness for coming into court. Throckmorton again addressed the court and humbly begged that this witness might be heard, as well as the witness for the crown. Whereupon the Privy

Counsellor notified the witness to leave the courtroom without giving any testimony. Throckmorton made a great point of this with the jury in addressing them in his own behalf, calling especial attention to the fact that the witness could not have been dismissed for anything that he had to say against him, but contrariwise, that it was feared that he would speak in his favor.

The result of it all was that the jury acquitted Throckmorton of treason and the court, "being dissatisfied with the verdict, at first *committed the jury to prison* and later sentenced the foreman and another to pay 2,000 pounds apiece within a fortnight, and the other six 1,000 pounds each, and sent them all back to prison until the money should be paid." Five of the jurors were later discharged on paying 220 pounds apiece, and the rest were subsequently let off on paying 60 pounds apiece.

Even in our own country in the case of *People v. Sheldon*, 156 N. Y. 268, the trial judge kept the jury out eighty-four hours and thus compelled a conviction, which the Court of Appeals reversed on the ground that the prisoner was convicted by force and not by reason or evidence.

Then, too, we have the trial of Captain Dreyfus in the French courts, conducted within the last twenty-five years. There, it is true, a jury was sworn, but apparently its sole function was to register the edict of the government, the army and the press, each of which demanded a conviction. Of course, as is the rule in France, the defendant was *presumed to be guilty* until he should prove himself to be innocent, but

every effort of himself and his counsel to elicit the truth was thwarted. A hostile audience, with which the courtroom was packed, was permitted to shower the accused with contumely. Invective from court, prosecutor and witnesses took the place of evidence and argument. There was no right of cross-examination, no law of evidence. Witnesses who were summoned defiantly stayed away. Those who came refused to testify further than they chose and were suffered to harangue the jury for the prisoner or against him amidst irrepressible applause. Hearsay was the main staple of the proceedings. Perfect pandemonium prevailed throughout the trial, and at the end of two weeks the heroic defendant was convicted and sentenced and his principal witnesses were degraded or dismissed from the public service.*

From this account of the Dreyfus trial one might almost imagine he was before one of our recent senatorial commissions, where hearsay testimony was freely accepted as proof of guilt, not only by the senators themselves but by a large majority of the public as well, although many of the accusations came from the most tainted sources,—ex-convicts, discredited women, train bandits and the like.

There was in England a special form of punishment, *peine forte et dure* (pressing to death for standing mute upon trial), which was used as late as the time of King George II. In Ireland in 1870, one Matthew Ryan, who stood mute upon his trial for highway robbery, was pressed to death. As the weights were heaping on the wretched man, he earn-

* "Zola, Dreyfus and the Republic," by F. W. Whitridge.

estly supplicated to be hanged, but it was beyond the power of the executioners to deviate from the form of punishment.*

In fact, punishment of all kinds was inflicted upon accused persons who refused to submit to a trial by jury. "That they be barefooted, bareheaded, placed upon the bare ground continually night and day; that they only eat bread made of barley and bran, and that they drink not the day they eat, nor eat the day they drink, nor drink anything but water, and that they be put in irons." In other cases they were "compelled to lie on the ground naked, save trousers, to have put upon them as great a weight of iron as they can bear and more and to have for food only the poorest bread that can be found, and standing water from the place nearest the jail, and these on alternate days, and so the diet till death."

Sir Henry Hawkins, in his "Reminiscences," gives an amusing description of the conduct in olden times of the judges in the court of the Old Bailey—"a veritable cesspool for the off-scourings of humanity." There, he says, three judges usually sat together to pass upon offenses that would now be treated as not even deserving of a day's imprisonment, but which were then invariably punished with death. These judges sat right through until five o'clock and then went to a sumptuous dinner provided by the Lord Mayor and Aldermen. At this dinner everybody's health but their own was drunk and their minds were thoroughly relieved of the horrors of the courtroom, and later, having indulged in

* (2 Wheeler's Cases.)

much festive wit, the judges returned into the courtroom in solemn procession, and looking the picture of contentment and virtue.

In the Old Bailey there was one important dignitary, the Chaplain of Newgate. This reverend gentleman attended the court in robes, and his one solemn function was to say "Amen" when the sentence of death was pronounced by the judge. The most striking thing about the after dinner trials was the extreme rapidity with which the proceedings were concluded. As judges and counsel were both exhilarated, the business was proportionately accelerated. Sir Henry Hawkins gives an amusing account of one of these after dinner trials which he himself witnessed, although he adds that it was only occasionally that one was favored with such dispatch.

"Jones was the name of the prisoner. His offense was that of picking pockets, entailing, of course, a punishment corresponding in severity with the barbarity of the times. It was not a plea of 'guilty,' when, perhaps, a little more inquiry might have been necessary: it was a case in which the prisoner solemnly declared he was 'not guilty,' and therefore had a right to be tried. The accused having 'held up his hand,' and the jury having solemnly sworn to hearken to the evidence, and 'to well and truly try, and true deliverance make,' etc., the witness for the prosecution climbs into the box, which was like a pulpit, and before he has time to look round and see where the voice comes from, he is examined as follows by the prosecuting counsel:

“I think you were walking up Ludgate Hill on Thursday 25th, about half-past two in the afternoon and suddenly felt a tug at your pocket and missed your handkerchief which the constable now produces. Is that it?’

“‘Yes, sir.’

“‘I suppose you have nothing to ask him?’ says the judge. ‘Next witness.’

“Constable stands up.

“‘Were you following the prosecutor on the occasion when he was robbed on Ludgate Hill, and did you see the prisoner put his hand into the prosecutor’s pocket and take this handkerchief out of it?’

“‘Yes, sir.’

“Judge to prisoner: ‘Nothing to say, I suppose?’ Then to the jury: ‘Gentlemen, I suppose you have no doubt? I have none.’

“Jury: ‘Guilty, my lord,’ as though to oblige his lordship.

“Judge to prisoner: ‘Jones, we have met before—we shall not meet again for some time—seven years’ transportation—next case.’

“Time: two minutes, fifty-three seconds.”

In one of these trials at the Old Bailey, Sergeant Arabin, Commissioner of that court, *having just dined*, sentenced the prisoner in these words: “Prisoner at the Bar, if ever there was a clearer case than this of a man robbing his master, *this case is that case.*”

In the reign of King James II, in the days of the “Terrible Jeffreys,” the powers of the jury were almost worthless and

trial by jury was a mere form. Jurors who ventured to bring in a verdict against the wishes of the crown met with severe and summary punishment, as we have seen, and, of course, this resulted in intimidating those who were unwilling to be martyrs to their consciences, and many jurors who first returned verdicts of "Not Guilty" were virtually ordered to change their verdicts. Upon retiring the jurors were locked up without food or drink, nor were they allowed any communication with the outer world.

Edwards, in his "Jurymen's Guides," records cases where three of the jurors were found with sweetmeats in their pockets and the court held that, whether they had eaten them or not, they were finable—it being a very great misdemeanor. Once a juror had an orange, but he swore he carried it only for the sake of the *smell*, and so he was excused and the verdict was held good! In the same work an instance is given of a man who struck a juror at Westminster who had brought in a verdict against him. This man was indicted and arraigned at the suit of the King, and the judgment was that he should go to the Tower of London and there remain in imprisonment all his life and that his right hand should be cut off and his lands seized.*

While commenting upon the barbarity of the English judges in the seventeenth century, it would hardly be fair to omit Lord Chief Justice Matthew Hale, 1660–1676, who presided over the King's Court in the reign of Charles II. I

* (2 Rolls AB 76.)

remember once reading that between the middle of the fifteenth and the seventeenth centuries, there was hardly a man in England of any prominence in the law who was not at one time committed to the Tower. Even so great a judge as Lord Bacon served his term in the Tower for bribery, in common with many of the other English judges of that period. But Chief Justice Matthew Hale carried his abhorrence of bribery and corruption to a most amusing extent. Burnet gives an account of a noble duke who called on Lord Chief Baron Hale for the covert purpose of giving him information that would better enable him to understand a case shortly to be tried before him. The Lord Chief Justice answering him said:

“Your Grace does not deal fairly to come to my chamber about such an affair, for I never receive any information of causes but in open court where both parties are to be heard alike.”

The duke withdrew and was silly enough to go straightway to the king and to complain of this as a rudeness not to be endured. His Majesty, Charles II, answered:

“Your Grace may well content yourself that it is no worse, and I thoroughly believe he would have used myself no better if I had gone to solicit him in any of my own causes.”

Whenever Judge Hale bought anything after he went on the bench, he not only would not try to bargain over the price, but often insisted on giving more than the vendors demanded, lest if they should afterwards have suits before

him, they might expect favor because they had dealt handsomely by him. Lord Campbell tells an amusing story about Hale and a gentleman in the west of England, who had a deer park and was in the habit of sending a buck as a present to the judges of Assize. Upon one occasion he made such a gift to Lord Chief Baron Hale when he came on the Circuit. The following extraordinary dialogue then took place in open court:

Lord Chief Baron: Is this plaintiff the gentleman of the same name who has sent me venison?

Plaintiff: Yes, pleased to meet my Lord.

Lord Chief Baron: Stop a bit then, do not yet swear the jury—I cannot allow the trial to go on until I have paid him for his buck.

Plaintiff: I would have your Lordship to know that neither myself nor my forefathers have ever sold venison, and I have done nothing to your Lordship which we have not done to every judge that has come to circuit for centuries bygone.

Messenger of the County: My Lord, I can confirm what the gentleman says for truth for twenty years back.

Lord Chief Baron: That is nothing to me. The Holy Scripture says, "A gift perverteth the ways of judgment." I will not swear the trial to go on until the venison is paid for. Let my butler count down the full value thereof.

Plaintiff: I will not disgrace myself and my ancestors by becoming a venison butcher. From the needless dread of selling justice your Lordship delays it. I withdraw my record.

Macaulay, in his *History of England*, devotes nearly a hundred pages to the remarkable trial of the seven bishops conducted during the reign of James II. He claims that the prosecution of the bishops was an event which stands alone. In April, 1688, James II put forth his second Declaration of Indulgence, and later made an order that this Declaration be read at divine service by the official ministers in all the churches and chapels of the kingdom. The clergy of the Established Church regarded the Indulgence not only as a violation of the laws of the realm and a breach of the plighted faith of the king, but also as a fatal blow to the dignity of their own calling. Whoever ventured to resist ran the risk of being ejected from his parsonage, deprived of his whole income, pronounced incapable of holding any other spiritual preferment, and left to beg from door to door. Though it was realized that if the whole body of the clergy should offer united opposition to the royal will, the king would scarcely venture to punish ten thousand delinquents at one time, yet there was no opportunity to organize any such opposition.

Finally, however, the archbishop and six of the leading bishops, after long deliberation, drew up and signed a petition to the king, stating that they could not in prudence or in conscience be parties to the publishing of an illegal declaration in the House of God and during the time of divine service. Upon receiving this petition the king denounced it as a "standard of rebellion." Thereafter the document which had been put in the hands of the king was published word

for word in print and was peddled throughout London. It was said that a printer cleared a thousand pounds in a few hours by these penny broadsides, although it has always remained a mystery how the text leaked out.

The result was the prompt indictment of the archbishop and his six colleagues, who were brought before the Court of King's Bench on a charge of seditious libel and were subsequently thrown into the Tower. That they would be convicted there was scarcely a doubt, since the judges and the officials were mere tools of the court. Scarcely one prisoner whom the government was bent upon bringing to punishment had been absolved by the jury.

Before the day of the trial public agitation had spread to the farthest corners of England. To pack a jury was now the great object of the king, and the crown lawyers were ordered to make strict inquiry as to the qualifications of the persons who were registered. Among the forty-eight persons who were nominated as jurors there were said to be several servants in the king's employ and several Roman Catholics, but as counsel for the bishops had a right to strike off twelve, these persons were removed. The crown lawyers also struck off twelve, reducing the list to twenty-four. The first twelve who answered to their names were to try the issue.

The jury consisted of persons of highly respectable station. The foreman of the jury was Sir Roger Langley, a baron of an old and honored family, and with him were joined a knight and ten equeries, men known to be of large posses-

sions. One of the jurymen excited considerable laughter. He happened to be a groom of the palace and complained bitterly of the position he found himself in, saying, "Whatever I do I am sure to be half ruined. If I say 'not guilty,' I shall groom no more for the king; if I say 'guilty' I shall groom no more for anybody else!" After the trial commenced the audience listened with as great awe and anxiety as though the fate of everyone of them hung upon the verdict, and the turns of fortune were so sudden that the multitude "swayed from anxiety to exultation and back again from exultation to still deeper anxiety."

It was dark before the jury retired to consider their verdict. The night was one of intense excitement. The solicitors for the bishops sat up all night, with a body of servants, on the stairs leading to the room where the jury was deliberating. It was absolutely necessary to watch the officers who guarded the door, for those officers were put there in the interest of the Crown to aid the king's adherents to starve out the other jurors. Not even a candle to light a pipe was permitted past the door. Numbers of people walked the neighboring streets till dawn. The voices of the jurors were repeatedly heard in loud debate within their room. At first nine were for acquittal and three for convicting. Soon two of the minority gave way, but one remained obstinate. Thomas Austin, a country gentleman of great estates, arose and announced to the jury, "I am the largest and strongest man among the crowd and unless you find the petition in this case a libel here I will stay until I have outgrown a

tobacco pipe." Nevertheless, soon after that despairing threat the jury agreed.

When the verdict of "not guilty" was announced, the benches and galleries raised a shout and on the instant ten thousand persons who had crowded the court hall replied with a still louder shout. The boats which gathered on the Thames gave an answering cheer. As the news spread, streets, squares and market places resounded with acclamations. The roar of the multitude was such that, during a half hour, scarcely a word could be heard in the court. The jury could hardly make their way out of the hall. They were forced to shake hands with hundreds. The streets were aglare with bonfires, surrounded by crowds singing good health to the bishops and deriding the Papists. Windows were lighted with rows of candles, each row consisting of seven in honor of the seven bishops.

The acquittal of the bishops is an event which stands by itself, typifying both love of the church and love of freedom. Altogether, the result of the trial is one of the most remarkable and renowned instances of the courage of a jury in resisting the arbitrary will of power and authority.

From these accounts it must be seen that the jury system during the time of the Tudors and the Stuarts was but a very poor safeguard for the personal liberty of any British subject, although as I have pointed out, the jury system existed in the same form and character as it does at the present day. But to quote a recent writer on this subject: "In a later period when the public idea of liberty generally

awakened and popular power strengthened, the jury system became amply sufficient to protect personal rights and liberty, even when assailed by royal prerogative."

According to a note in the *Atlantic Reporter*, trial by jury was introduced into this country with the landing of the Pilgrims, as well as the body of the common law and many of the English statutes. The American colonies, one by one, adopted the system in their constitutions, but they did not all adopt it at first, and even those who did so adopted only a modified form. No instructions in the law were given to the jury. The defeated party had the privilege of a review, that is, a new trial before another jury; but if he lost a second time, that was the end of the matter. If, however, he gained on the second trial the other party could demand a third trial, which verdict decided the cause forever. The right of every citizen to trial by jury was finally guaranteed by the United States Government in the Sixth Amendment to our Constitution.

From even this cursory history of trial by jury, it is evident that throughout the centuries juries, in one form or another, have always been used as a means of letting the people participate in the actual administration of their own laws. Even if it was not until the latter part of the sixteenth century that jurors in England began to assert themselves and to decide cases according to their own consciences rather than in obedience to the directions of the judges who in turn were doing the bidding of kings, yet the system itself, as well as the requisite of a unanimous verdict, sur-

vived all attempts to destroy it, and remains today the subject of ever fresh, vital interest. We Americans are in the main educated and intelligent people, living under and governed by laws of our own making, and it is of vital importance to us that these laws should be fairly administered by ourselves under the old, time honored method of trial by jury.

Sergeant Adams, who was at one time assistant criminal judge at the Sessions Court in London had a very pleasant wit and knew how to deal with any counsel who took to "high falutin." On one occasion, after an altercation with the judge, the counsel for a prisoner in his address to the jury reminded them that "they were the great palladians of British liberty—that it was *their* province to deal with the facts, *the judge's* to deal with the law—that they formed one of the great institutions of their country, and that they came in with William the Conqueror."

Adams, at the end of his charge said: "Gentlemen, I presume you will want to retire to consider your verdict, and as it seems you came in with the Conqueror, you can now go out with the bailiff!"

CHAPTER III

WITNESSES

You took your seat in the jury box, Mr. Juror, at the beginning of the last chapter. I hope you are still sitting there, and if you are, I want to apologize for my long recitation of the history and gradual development of your dignified office. I thought it necessary to impress upon you what an important personage you had become and what a series of misadventures you had passed through in obtaining your present exalted position. You are now a fullfledged officer of the court, tagged with the emblem "Ancient and Honorable," sworn to "well and truly try and true deliverance make" of the disputes that are submitted to you for decision.

How may you expect to obtain the evidence from which you hope to reach a just verdict? Obviously, from the witnesses who testify before you. Is there going to be anybody who will try to aid you in arriving at a correct solution of the evidence, and if so, who is that useful personage? Obviously, the judge on the bench. Who will strive to put the greatest obstacles in your path? The play actors in the case, commonly known as "lawyers." Let us, therefore, consider these three elements that you will have to contend with in their natural sequence: the witnesses, the lawyers in the case, the judges and, lastly, your verdict.



LORD MANSFIELD

The "first crack out of the box," so to speak, will doubtless be a suggestion from some source or other that you are the "sole judges of the facts" in the case, and that the court can only advise you as to the law, to which you are expected to fit the facts, if you are able to decide what they are. In this connection you should congratulate yourselves over the fact that you really have nothing much to do with the law. It may be interesting for you to read the diagnosis of our present day legal situation as outlined by our Secretary of State, Charles E. Hughes, and delivered before the American Law Institute last month. Every lawyer who heard him was simply overwhelmed with the magnitude of the yearly output of new laws. According to Mr. Hughes 175,000 pages of decisions were rendered in the last year. There are an average of 12,000 or more new statutes each year, and 13,000 or more recorded decisions of our highest courts each year. You may well congratulate yourselves, therefore, that it is no part of your duty to try to keep up with the legislation and decisions we have thrust upon us each and every year, to say nothing of the accumulation of precedents handed down from countless other years.

When the Roman law had gotten into something like the condition which ex-Justice Hughes refers to, Emperor Justinian immortalized himself by making a collection of excerpts from such legal treatises as were then in existence, as well as of the laws which corresponded to our statutes, and then decreed that all the rest of the treatises and constitutions *should be burned*. It will not be many years before some

august body of suitable men will have to undertake a similar Herculean task for our country, but that is quite beside the subject we are considering here. Supposing we conclude, therefore, to leave the law to the judges.

Sometimes I think it is a pity that jurors should not be allowed also to divest themselves of some of the lawyers as well as the law, for, with all due respect to my profession, lawyers, especially the unscrupulous ones, are often rather a serious stumbling block in your quest for the truth. The lawyers will try to tell you a lot of things about the evidence and what they "expect to prove" the facts to be. I counsel you to listen politely to what they have to say in order that you may learn something of what the case is all about, and then I suggest that you wipe your mental slate clean, and thereafter let it record only what the witnesses themselves are willing to take oath to. What the lawyers will tell you in their preliminary or opening addresses will be only hearsay, at best, and you may be sure it will be dressed up to suit their respective sides of the case. So far as your duties are concerned, the thing that should interest you first, last and all the time, is *what the witnesses have to say on the subject*.

If you will pardon a slight digression from the main point that we are discussing, I should like to suggest a thought or two concerning the lawyers in the case whom you will constantly have to contend with. You may be perfectly clear in your mind, you may have even definitely decided what the facts really are in any given case before you begin to

listen to the "summing up" of the lawyers on one side and the other. But if counsel on both sides of the case are equally clever your troubles are sure to begin; first one lawyer will convince you his client has the right of it, and then the other side will do his best to upset all that the first lawyer has accomplished. My advice to you is to keep repeating to yourself, "*The evidence is the thing*"—then your task will be greatly simplified.

It is all very well for me to advise you to keep your minds on the evidence and shun the lawyers, but I do not mean it too literally. I might just as well suggest that you go to a theatrical performance and only listen to the songs and dialogue with your eyes shut, instead of watching the actors act and the dancers dance. A trial where one's only duty was to listen to what the judge and the witnesses had to say, there being no lawyers present, would be as dull a proceeding as a motion picture to a blind man. The lawyers, with their pleasantries and repartee and their constant plodding and pecking at the witnesses, keep the proceedings alive, relieve the monotony of a long trial and provide nearly all the amusement and charm. Listen to it all, gentlemen, enjoy it all to the full, but do not let it sway your verdict. "*The evidence is the thing*"—let that be your slogan.

I shall have a lot of amusing things to tell you about the "lawyers in the case" later on; but I can not resist repeating to you a lesson I learned from the dear, stern old Recorder Smyth many years ago when I was in that formative stage when young attorneys discover for themselves as well as

their friends whether or not they are "cut out" for the task they have chosen. The Recorder seemed to think that he could make a prosecuting attorney out of me if he only worked hard enough at the job. He used to make his points strike home by amusing and pertinent anecdotes.

"Charlie" Brooke in those days was among the leading trial lawyers at the Criminal Bar of this city. Had he been more of a student and less of a *bon vivant*, he might have become a really great advocate. He had keen common sense and quite an unusual gift of oratory, though I always felt he talked over his juries' heads. One day he had just completed one of his very best efforts in behalf of his client, who happened to be on trial for a little matter involving his life. Brooke had gone out into the corridor to get a breath of air. He was surrounded by a lot of hangers-on who always frequent a criminal courtroom and who invariably "root" for the prisoner and applaud his counsel. These enthusiasts almost embraced Brooke as they complimented him on his oratory and assured him his client would be acquitted "in a walk." Brooke turned on his admirers, and with a scornful expression suggested, "If you fellows will take the trouble to peep in the door of the courtroom, you will observe that the District Attorney is now reading *the stenographer's minutes of the evidence* to the jury. After that the prisoner hasn't a Chinaman's chance to get off."

You see, gentlemen, the evidence is the thing that counts. But here again, the really clever advocate has the "art which conceals art" and will try to make you think he is

only talking about the evidence, when in reality he is making a most subtle appeal to your sympathies and prejudices.

Professor Matthew relates an anecdote of Rufus Choate which may serve as an illustration of the point to which I am now directing attention. "We were once," writes the professor, "talking about the ability of Rufus Choate with an intelligent old gentleman in Massachusetts, a hard-headed bank president, who had served as foreman of the jury in a lot of cases. 'Mr. Choate,' said he, 'was one of the counsel in the case, and knowing his skill in making white appear black and black appear white, I made up my mind at the outset that he should not fool me. He tried all his arts, but it was of no use; I just decided *according to the law and the evidence.*'"

"Of course, you gave your verdict against Mr. Choate's client?"

"Why no, we gave a verdict for his client, but then, we couldn't help it; he had both the law and the evidence on his side."

Sir James Scarlett was undoubtedly one of the first advocates of his time at the English Bar. His speeches were of the colloquial order. He took pains never to alarm his juries with the fury of rhetoric; he never bullied them like Lord Brougham, who attempted to wring his verdicts from juries by his oratory and thus to force them to do his bidding. A story is told about Scarlett by Justice Wightman, who when leaving his court one day, found himself walking in a crowd alongside a countryman whom he had seen day by

day serving as a juryman, and to whom he could not help speaking. Liking the looks of the man and finding that this was the first term at which he had served, Judge Wightman asked him what he thought of the leading counsel. "Well," said the countryman, "that lawyer Brougham, he be a wonderful man; he can talk, he can, but I don't think nowt of lawyer Scarlett." "Indeed!" exclaimed the judge. "You surprise me, for you have given him all the verdicts." "Oh! There's nowt in that," was the reply. "He be so lucky, you see; he be always on the right side."

But to return to our imaginary trial. The lawyers have had their preliminary talks—their "openings," as they are called—and the witnesses begin to tell their stories from the witness chair. The first query that naturally arises in your mind is how you are to tell where the real truth lies, when you hear perhaps a dozen or more witnesses all contradicting each other in some particular, and some contradicting others in all particulars. In other words, how are you going to tell whether the witnesses have made honest mistakes or have committed intentional perjury?

In nearly every case the first witness to take the stand will be the plaintiff or party most interested in the result. Some learned professors of the law, who very likely have never actually tried a single jury case themselves, tell us that the parties to a litigation are so likely to be influenced by their interest in the result as to be *incapable* of telling the truth, although they admit there are occasional exceptions to this rule. This does not accord with the experience of the

writer. Doubtless the interest of the party plaintiff or defendant is a matter that should have serious weight with the jury in deciding how much credence to give to his evidence. But a witness's interest in the result is only one of the elements to be taken into consideration. Many plaintiffs are dishonest in the highest degree, while others even lean over backwards lest they be led to overstate the matter in their own behalf while under oath. They often even seriously injure their own cause by an unwillingness to state facts or conversations that are not perfectly clear in their memory. Their frank statements, "I don't remember," like as not, arouse a certain suspicion or prejudice against them in the minds of some of the jurors.

At one stage in the history of the courts in England both judges and lawyers were firmly convinced that the least temptation was sufficient to lead a witness to commit perjury; hence the rule prevailed that no one who had an interest in the result should be allowed to testify under any circumstances. Such persons were not considered credible witnesses; it was thought that they were so certain to swear to what was false that nobody could believe them. This rule led to a very peculiar state of affairs, because the people who were in fact interested in the result were likely to be the very witnesses who would know most about the facts; and if their testimony was not to be received, in consequence of their interest, it made it difficult to get at the truth of the matter. It became apparent to everyone, therefore, that the rule must be changed, and now, both in England and

America, the evidence of interested witnesses is received and left to the jury for what they may consider it to be worth.

Oftentimes the only two witnesses who can testify concerning the main facts in a case are the plaintiff and the defendant, both equally interested witnesses. There may be letters or other written documents that throw light upon the oral testimony of the litigants, but I am speaking of what is usually the turning point in the case, the one overshadowing conversation or circumstance which can only be known or testified to by the parties themselves. Naturally one contradicts the other, or there would be no need to summon a jury to decide between them. Which one are you going to believe and how are you going to arrive at that belief?

The plaintiff in his own behalf takes his seat in the witness chair. The chair is placed on a platform so that you can have a good look at him. What is his general appearance? Does he look like an honest man? Has he a frank, open face? Is there something about him that recommends him as a man to be trusted? Is his story probable? Does he seem to be a man of intelligence, with a good memory, so that you can rely upon the accuracy of his statements if you are convinced he is trying to tell the truth? Jurors should always try to decide upon evidence as they would decide any question arising in the ordinary affairs of life, often testing it by their own observation and experience. Some witnesses have a way of saying things that chal-

lenges contradiction regardless of their interest in the case or any other motive.

A German had fitted up a fine barber shop with mahogany sideboards and elaborate fittings, and a tenant just above him had let the water basin run over during the night, causing the plaster to drop and spatter all over the new furniture in the barber shop below. When asked to make the damage good, the tenant made light of it and replied, "Oh, you go to Hell!" Therefore the barber brought suit in the Justice's Court before a jury. At the trial the barber, as the only witness in his own behalf, stated to the jury with great candor what had been said by the tenant. When the lawyer asked him, "And what did you say?" he replied, "I said, 'I will not go to Hell. I will go to law!'" And then, rising to his feet and turning to the jury, he said, "And schentlemen, that was schust so bad as to go to Hell!" He won a right verdict by saying the right thing at the right time.*

The parties interested in the result often display to a crowded courtroom their appreciation of their own supreme importance in a most amusing way. One is reminded of the story of the highwayman of whom it was related that, when the chaplain on the way to the scaffold said he feared they would be late, the condemned man quietly answered, "Never you trouble about that, sir, *they can't begin without me.*"

In passing judgment upon the veracity of any witness, be he interested or not, it is well to bear in mind that any-

* Donovan's "Modern Jury Trials,"

body, however truthful and intelligent, is apt to take the oath as a witness with trepidation akin to real fear, especially when he realizes that the opposing counsel is waiting to cross-examine him as a hostile witness and turn his evidence into ridicule, if possible, or discredit him altogether.

Sir Arthur Conan Doyle tells how he once sent a telegram to each of twelve friends, all men of great virtue and reputation and of considerable position in society. The message was worded: "Fly at once; all is discovered." Within twenty-four hours, the story runs, all twelve had left the country.

Chief Justice Burke, a man who himself had presided over many trials, having been summoned once as a witness said to one of his friends, "The character of a witness is new to me, Philip. I am familiar with nothing here. The matter on which I came is most important. I need all my self-possession and yet I protest to you I have only one idea and that is *Lord Brougham cross-examining*."

On the trial of an indictment against a number of defendants in one of our Federal Courts, one of the defendants made a complete confession and was accepted as a witness for the government against his former associates. He was warned that he would probably be mercilessly cross-examined and was told that his own safety would lie in weighing his words carefully and telling the exact truth in answer to every question. That this prospect rested heavily on his mind was soon apparent. Counsel for the defense put to

him in cross-examination the usual questions directed to witnesses who turn "state's evidence:"

Q. You have admitted that you are guilty of this crime?

A. Yes, sir.

Q. You were not arrested?

A. No.

Q. You were not indicted?

A. No.

Q. You are a free man today?

A. Yes, sir; *but perhaps I ought to say that I am married.*

The "Terrible Judge Jeffreys," whom you will remember from a former chapter, once mistook one of these apparently stupid witnesses, and having taken quite a dislike to the man (who had been testifying in his court and happened to have a very long beard) finally broke out with the remark that if his conscience was as long as his beard, he must have a very troublesome one. To this the witness quietly replied, "My Lord, if you measured consciences by beards you would have none at all."

Frequently one hears a timid, half-frightened witness testify to some immaterial fact which is readily broken down by a few sharp, blustering questions by the cross-examiner. His story is really honest in the main and merits credence by the jury, rather than their scepticism. Yet it is not uncommon for juries, distracted by these pointless conquests of the cross-examiner, to completely lose sight of the main issues in the case.

A witness, obviously a gentleman, who had given his

evidence in a straightforward fashion, but who happened to have a very red or sunburned face, was suddenly confronted by the opposing counsel who walked up to him and exclaimed, "You are a drinking man, aren't you?" Whereupon the witness replied in a very dignified way, "That's *my* business, sir." As quick as a flash the plaintiff's attorney countered, "I *see* it's your business, but will you tell us if you have any other business?" The courtroom burst out in laughter and counsel very wisely let the witness leave the box, with the probability that the jury *forgot* him altogether thereafter.

A somewhat similar story is told of Sir Edward Carson to the effect that on one occasion a gorgeously arrayed person confronted him in the witness box and, in reply to the question whether he was a commercial traveller, said with proud emphasis, "I *ham*." Carson congratulated him with the sarcastic remark, "Then, sir, you are the best dressed ham I have ever seen."

The witnesses whose testimony you will be called upon to weigh are likely to exhibit all shades and ramifications of human morals, human passions and human intelligence. The power to make a correct decision whether they are truthful or perjured witnesses is largely a matter of instinct. The language of the eye, the tone of the voice, the countenance of the witness, his manner of testifying,—or all of these things put together—betray the perjurer. Some experienced jurymen learn to watch every expression of the face, especially the mouth, even the movement of the hands, and the

whole bearing of the witness in arriving at an accurate estimate of his integrity.

Many witnesses who have no direct interest in the result may be in a position to derive a very decided and persuasive indirect benefit from the verdict. And there may be other equally persuasive motives which will color the testimony or lead to exaggerations. There is one thing which I am sure many jurors lose sight of, and that is that nearly every witness, disinterested though he be, always *feels* a certain partisanship towards the side that calls him to testify. He is more or less complimented by the confidence that is placed in him to prove a certain state of facts, and it is only human for him to try and prove himself worthy of this confidence. With this thought in mind he may add only a bit here or suppress a bit there, but this bit may make all the difference. Beware, then, of the man who yields to the temptation to be considered a "fine witness" for the side that calls him.

When witnesses of a low order of intellect testify falsely, they usually betray the fact in various ways: by the voice, by a certain vacant expression of the eye, or by a nervous twisting about in the witness chair. Sometimes they unmask themselves by an evident effort to call to mind the exact wording of the story they are supposed to tell. At other times they show it by the use of language not suited to their station in life.

On the other hand, there is something about the manner of an honest, though ignorant, witness which makes it manifest at once that he is narrating only the things that

he has actually seen and heard. The expression of his face changes with the narration as he recalls the scene to his mind; his eye brightens as the various incidents come back to him; he uses gestures natural to a person of his station in life and tells his story in his accustomed language.

A question is put to a witness as to what he was doing at a particular time—a matter important to the inquiry. “I was talking to a lady,” comes the answer, adding, “I will tell you who she was, if you like; you know her very well.” My experience has led me to the conclusion that honest witnesses endeavor to confine themselves to the facts they are called to prove, but that lying ones endeavor to distract the attention by introducing something irrelevant. And it is this trait in a witness that often proves an excellent test of the falsity of his statements.

If a witness makes a particular statement on the stand, a juror naturally asks himself what opportunity the witness has had to acquire the knowledge he takes oath to. Even if it turns out that he had the very best possible opportunity to observe the facts he testifies to, yet he may not have the keenness to observe them exactly, nor sufficient intelligence to recount them correctly.

Everybody knows that, where two people witness the same occurrence, they almost invariably take away with them a materially different impression of it. When called to the witness stand, each is willing to swear to his own impression as the fact. Obviously both accounts of the same transaction cannot be true. Which had the better oppor-

tunity to see? Which had the keener power of perception? Which would be likely to retain that perception accurately for any length of time, and—what is perhaps still more difficult—be able to describe it intelligently? All witnesses are apt to exaggerate, either to enlarge or minimize the facts to which they take oath, and few witnesses fail at least in some part of their story to entangle the facts with their own beliefs and inferences.

A French thinker says: "Men have witnessed some simple fact. Gradually, when it is distant, in thinking of it they interpret it, amplify it, provide it with details of their own; imaginary details become incorporated into the actual details and seem thus to be recollections."

It will be part of your duty, Mr. Juror, to try to separate imagination from memory, fact from inference. Keep your mind constantly upon the probability or improbability of the story that you are listening to. Ask yourself constantly what you would or would not have done under similar circumstances. If at any time it appears that any witness is actuated by any real motive, such as revenge or hatred, naturally you will place very little credence in what he says. Everyone knows the safe rule to be that a liar is not to be believed even when he speaks the truth.

Women are considered by some lawyers to make better witnesses than men when testifying to what they have seen, as they are not so apt to mix up their evidence with surmises as to what happened. However, I have often wondered if the women witnesses I was forced to examine really did

appreciate the nature of an oath, or if it was only that they did not fear punishment for disregarding it, as much as men do. There can be no doubt on one point, however. The moment a woman's passions become involved, the moment her love for her husband or her children, or her hatred for a neighbor enters into the question,—not a word she says on any subject should be credited by a jury.

It is a mistake for a juror to suppose that he is compelled to believe a witness who has not been contradicted or impeached, simply because he has taken an oath to what he says, provided, of course, you feel that you have a good reason for disbelieving him, even if it is an instinctive reason and one that you could not convey to another person.

It often happens that a witness on cross-examination is contradicted by some affidavit that he has previously made on some subject germane to the issue on trial. The jurors should recollect that these affidavits, being drawn by counsel, are the least reliable kind of evidence, and are often not even read by the people who sign them. I read once of an extraordinary instance of the recklessness with which affidavits are sometimes made, in an article written by an Englishman and published in *Blackwood's Magazine* some years ago. In a dispute over boundaries an affidavit of the "oldest inhabitant" was produced, in which the deponent swore that the boundaries as delineated on an accompanying map were the boundaries as he remembered them from his youth. When the oldest inhabitant was produced in court for cross-

examination, it turned out he was stone blind and had been so since his birth.

Always look more to the meaning a witness apparently wishes to convey than to the exact language he uses. The memory of one witness may not be as clear and distinct as another's, but slight contradictions should not indicate to you that a witness is unworthy of credit, for very few witnesses, if they are testifying to a considerable number of facts, fail to refer to some unimportant matters that may turn out to be in conflict with other evidence. One witness's mind may be so deeply impressed with one matter that he does not observe something which may have been equally apparent. Something may have taken place in the very sight of the witness and yet he may not have observed it; or if he has observed it, he may have forgotten it. You should not throw out his entire testimony simply on this account, for he may be an honest and reliable witness notwithstanding.

Again, you should always be on your guard against coached or drilled witnesses such as, I regret to say, seem to abound in our courts. A drilled witness will usually hesitate to testify to any particulars outside of his original story. He will seek to avoid answering; he will try to take time for deliberation before he replies. The cross-examination will oftentimes tell the tale in such cases, but where there are a number of witnesses on one side all testifying to practically the same facts and in almost the same language, you certainly will be justified in suspecting collusion. In a case in

which I was counsel the result largely depended on the evidence of a girl of fourteen or thereabouts, an intelligent, respectable looking child. I commenced my examination in the usual way, eliciting a single fact by each question. "Better let her tell her story in her own way," said the judge. This she did, and apparently in the most truthful manner. She was a prepossessing child, and the jury were impressed. "I do not propose to cross-examine the witness," said the clever counsel opposed to me. "But, Jane," he continued in a pleasant way, "tell it us all over again, that's a good child." And she began again from the beginning; she was absolutely letter perfect; there was not a word of variation. She had been coached, but not by me!

"Rufus Choate's fairness in the treatment of witnesses often secured their favor and the goodwill of the jury. If the witness was timid, he was encouraged; if nervous, soothed; if eager, repressed; if honest, protected; if crafty and adverse, exposed. Witnesses who wished to tell the truth found him patient, courteous, helpful and considerate. He knew that they often err from want of memory,—perhaps from inability to distinguish what they know from what they have heard. So, having the sanctity of an oath in mind, he cared for the witness as he cared for himself. Such witnesses often remembered him with gratitude, while dishonest witnesses learned to fear him." *

Mr. Justice McGoldrick told me of a case that was tried

* Neilson's "Memories of Rufus Choate."

before him last month where a witness made an extremely reassuring answer to a cross-examiner who was trying to impress upon the jury that the witness was coached. Plaintiff was a passenger on the front part of a trolley car which collided with a truck. The witness was sitting alongside the chauffeur of the truck. He was a tall, redheaded Irishman who had no interest whatever in the case. While on the stand, in his direct examination, he told how the accident happened in four or five sentences. On cross-examination the attorney asked him to tell the jury again just how the accident happened, and the witness did so in about the same words. Then the following colloquy took place:

Q. Do you realize that you have told this jury twice just how this accident happened in the identical language? (The witness looked at the attorney as though he did not fully comprehend the question.)

Q. Do you realize that you have told how this accident happened twice in the same words? (Again the witness seemed bewildered.)

Q. Don't you know you have told us how this accident happened in the same words twice, once to your attorney, and then again in response to my question; in other words, you have memorized just how this accident happened, haven't you?

A. Yes.

Q. Tell the Court and jury how you happened to memorize the story of how this accident happened.

A. I ain't got nothing else to do but drive a truck.

When the laughter in the courtroom somewhat subsided, and the attorney recovered his equilibrium, he continued:

Q. How long did it take you to memorize how this accident happened?

A. Four years—(looking at the attorney in a questioning manner)—it's four years since the accident happened, isn't it?

Many jurors try to follow the instructions of the judge to "weigh the evidence and decide where the preponderance is" by counting the witnesses on one side and the other. There is little to be gained by this. The question is one of credibility and reliability, not of numbers; of quality, not quantity.

I shall never forget the impression made upon me, when a very young man, by one of Wendell Phillips' great speeches delivered in the Boston Faneuil Hall, at a time when he was advocating a cause which was opposed by the great majority of his fellow citizens. He made it plain that he realized he was in the vast minority, but with uplifted hands he exclaimed, "*One witness with God, however, makes a majority.*"

One of my fondest recollections of the four years when I was in the District Attorney's office was a trial which I conducted, where a hopelessly ignorant German Jew, somewhere in his twenties, had been indicted for arson and was in danger of imprisonment for the greater part of his life. At the trial three or four of the members of the firm who employed him, together with several of his co-employees,

all testified to the circumstances of the fire in a way that pointed to the prisoner as the one and only person who had both the opportunity and the disposition to commit the crime. The fire had broken out during the night. It was testified that the prisoner was the last person seen to leave the premises, and it appeared that he had been laid off from his work that very day.

There were no witnesses for the defense, except the prisoner himself. He disclaimed any knowledge whatsoever of the occurrence, admitted having been discharged the very day of the fire, but claimed that he felt no resentment toward his employers on that account, and then turning to the jury, standing erect, he exclaimed in the most heart-rending voice: "Gentlemen, as there is a God in Heaven I had nothing to do with that fire."

There was something in his tone and manner that forced upon me the conviction that, though he stood alone and was implicated by the other seven witnesses in the case, he was telling the simple truth. I began to look about for motives on the part of my own witnesses which might have induced them to shift the guilt to this unfortunate man. In my summing up to the jury, while I was obliged, because of my office, to state the case of the People as fairly as I could, yet I soon found myself in reality pleading for the acquittal of the defendant. I called their attention to the heavy insurance the owners were carrying on the stock and the building. Was it possible that in order to collect this insurance they had themselves started the fire? Had they

planned in advance to discharge the prisoner, whose duties caused him to be the last person to leave and lock up the premises, for the very purpose of supplying a motive for the crime of which they intended to accuse him? They must account for the fire in some way or jeopardize their chances of collecting from the insurance companies, and so on.

I think I even told the jury the "One witness with God" story. At all events I acquitted the prisoner, and I shall never forget the satisfaction I felt after I had finished my argument, when Mr. Justice Ingraham called me to the bench and, putting out his hand, said I had convinced him of the poor devil's innocence. I felt that many of my associates in the District Attorney's office, if they did not actually say it, at least thought of me—"Wellman lost his arson case"—and I thank God I did.

A very considerable proportion of the cases that you may be called upon to decide are what are known as negligence cases, where the plaintiff sues an individual or a corporation for injuries received on the streets or in public conveyances. No litigant has a greater temptation to color and exaggerate his testimony than the plaintiff in such a case, and the evidence of his neighbors and relatives is equally unreliable. Perhaps the same thing can be said of the employees of a railroad, the motorman and conductor of a trolley car. Even the passengers in such cars usually take sides with the railroad, the side that calls them. For many years I represented all the surface and underground railroads in this city in the defence of such cases. Almost every week I was

obliged to call railroad employees as witnesses lest their absence be taken as a conclusive admission of their negligence, but I cannot remember ever hearing one of them testify to anything that might incriminate him or lose him his job during my ten years' contact with them. I finally adopted the plan of pointing out to the jury that in my judgment they should accept the story of railroad employees with no little hesitation. If anybody was to blame in the matter they were likely to be the ones, and therefore had a great temptation to exonerate themselves. This candor upon my part was sure to meet with the approval of the jury and gave me the opportunity I wanted to make them realize that the considerations which might properly cause them to disregard the testimony of employees applied equally to the injured plaintiff and his associates, whose motive for coloring the facts in their favor was even stronger than that of any street car conductor or motorman.

I remember in one of these cases the railroad's attorney produced one of the inspectors at the same time handing me a detailed account of the accident written by the inspector, so he claimed, the very night of the occurrence, when everything was fresh in his memory. I took an instinctive aversion to the man and refused to call him as a witness or produce his notes. The jury disagreed. When the same case was retried some months afterwards and the railroad company was defended by other counsel, it was proved that these notes had been written upon paper having a water mark which showed that the *paper was not even manufactured*

until two years after the date of the accident. The railroad lost the case for a very substantial verdict, mainly on account of this disclosure.

There is another class of witnesses used by both plaintiff and defendant in these negligence cases who may suitably be called pay witnesses. It is entirely legitimate for either side to pay witnesses the wages that they may lose while attending court. But though this practice seems only fair to the witness, especially if he is a laboring man, yet a jury should realize that the fact that, for the time being, the witness is receiving his wages from the party for whom he is testifying may have a very marked effect upon the story he tells. Sometimes the litigants subpoena such witnesses a full week before the case is reached for trial, pay their wages each morning, and then give them the day off, with the idea that they are fostering a frame of mind that may result in more willing and perhaps more positive testimony to the desired facts. There would appear to be no excuse for any such practice.

Nothing can be more exquisite than the irony with which Rufus Choate once closed his speech to a jury in one of these hotly contested railroad cases:

“My friends, the president and directors of the Boston and Worcester Railroad, honorable and high minded men as I know them to be, have probably considered that they would not be justified in paying to the plaintiff the large sum of money claimed in this case without the protection of a judgment in a suit at law; but I have no doubt, gentlemen,

if you establish the liability, every one of them would lay his hand on his heart and say, 'Give her all she asks and God bless her!' " *

It is in these negligence cases that the expert witness is in reality not a witness at all. He is trained in his profession and, like counsel, comes forward to maintain for a fee a certain view on some point and give his reasons therefor. In fact they often do, and always should, regard themselves much in the same category as the lawyers in the case. When on cross-examination it was pointed out to one of these expert witnesses the different view which he had maintained on the same point in another case, he indignantly replied: "You seem to forget, sir, that I, as well as you, was then appearing on the other side."

Apropos of this class of witness there is a rather trite saying that "there are liars, d— liars and expert witnesses." In fact all manner of fun is made of a certain grade of expert witnesses who so often sell their testimony. Of such a witness, Mr. Commissioner Kerr, who presided at the City of London Court, once said in his dry, witty way: "David said in haste all men were liars; if he were sitting in this court at this moment he would have said the same thing at his leisure."

But the "Judicial Wigs" do not always confine their witticisms to the experts. In a recent accident case where the doctor had finished his testimony for the plaintiff and counsel on cross-examination had brought out the fact that

* "Short Studies of Great Lawyers," by Irving Browne.

the plaintiff was so injured that he could lie only on one side, the judge interjected the remark, "I suppose, doctor, you mean he would make a very poor lawyer."

In a case concerning the boundary of certain lands, the counsel on one side having remarked with explanatory emphasis, "We lie on this side, my lord;" and the counsel on the other side having interposed with equal vehemence, "We lie on this side, my lord;" the Lord Chancellor Hatton leaned backwards, and dryly observed, "If you lie on both sides, whom am I to believe?"

In courts martial, whenever expert knowledge is required, the president of the court chooses his own experts and authorizes them to investigate and report, and the report is held to be conclusive upon all the parties concerned. The same system is sometimes adopted in our courts where the trial judge selects some medical expert to report to him and then to the jury the results of his investigation, his report then to be binding upon the parties. If the trial judge could always be empowered to select the expert witnesses whose testimony should be controlling for both sides, we would be spared the almost daily spectacle of hearing intelligent God-fearing members of the medical profession testifying to diametrically opposite pathological conditions.

Let me give you one example: Imagine a woman plaintiff who has suffered some street accident and is suing to recover damages. She limps into the courtroom on crutches, perhaps assisted by some companion. She can hardly move her limbs. Her tale of suffering cannot fail to arouse the sym-

pathy of all hearers. Her doctor corroborates her statements of suffering and admits his own inability to help her. The jury are eager to render her a verdict. Presto! the expert doctor for the defendant comes on the scene. Likely enough he is one of the leaders of his profession. He tells of his years of experience in hospitals and in private practice. He has made a careful examination of the plaintiff, and calmly swears that he can find nothing whatever the matter with her; that she is what the doctors call a "malingerer." When asked to define the word, he says, "She *imagines* she has something the matter with her; she is a pretender."

True, gentlemen, she does imagine she has something the matter with her; her disease is what is known as neurasthenia, a nervous disorder which in truth and fact is just as painful and disastrous to health as if it were a real organic disease. It likewise is a condition that can very well be brought on by shock, even where there are no bruises and no bones broken. But do you suppose the doctor volunteers to explain this fact to the jury? The woman's lawyer, usually working on a contingent fee, may lack the knowledge or experience to meet the situation, and the testimony is left to the jury with the two doctors apparently contradicting one another. This usually results in an entirely inadequate verdict for the injured woman through no fault of the jury.

Let us pause, however, and look at the other side of the question. We find doctors testifying that the plaintiffs whom they have attended are suffering from diseases from

which there can be no possible recovery, nor can they in all probability live more than a few months after the termination of the trial. Years afterwards, when cross-examining these same doctors, I have exhibited to them in the courtroom the very patients whom they had previously testified could never recover. So perhaps it is a safe rule to beware of experts on either side and sharpen your common sense to a pin point when you are attempting to weigh their testimony. It may very well occur to you to ask why, in such cases, the judge does not intervene and clear up the situation. My answer is that there are judges and judges. Some judges have not been long enough on the bench to understand the significance of the medical terms, and many others either lack the knowledge or else deem it outside their province to interfere with the lawyers in their management of the case. Such "interference" often promotes the cause of justice.

In a case tried not long ago several witnesses minutely described the man they saw commit the crime, and their descriptions fitted in every particular the prisoner at bar. The case was closed and was about to be submitted to the jury without any witness being asked if the prisoner really *was* the man they saw. It happened to occur to the judge to recall the witnesses and ask the question, and they all swore *he was not the man!*

There is one method of examining witnesses to which I feel I should call your attention in some detail; otherwise you are apt to get an entirely erroneous impression of what

a witness really knows and intends to testify to. I refer to the use of what is called leading questions, that is, questions which are so framed as to *suggest the answer*. A lawyer examining his own witness has no right to use leading questions. On the other hand, the lawyer on cross-examination has a perfect right to make use of them, *but the answers in both cases are equally misleading*, especially if the witness is of a low grade of intelligence. You may have heard of the famous question put on cross-examination to a man: "Have you ceased to beat your wife?" If the answer is, "Yes," he would admit he once did beat her. If the answer is, "No," he would admit that he continued to beat her. But I am speaking seriously when I warn you against accepting the answers to all leading questions, whether they are elicited on direct examination or on cross-examination.

Because of the important light his experiments throw upon this particular subject, I desire to make reference to the writings of the late Professor Hugo Münsterberg of Harvard University. In his "Essays on Psychology and Crime" he refers to his experiments in connection with this rule against leading questions or suggestions made to witnesses. He tells of many cases of patients who have submitted to his hypnotic influence and whom he has attempted to control after leaving his presence by post-hypnotic suggestion. He states in substance that it is the consensus of opinion among the leading psychologists of the day that a lawyer cannot possibly effect hypnotic influence over any witness he may be examining for the first time in

court, and that the "hypnotic eye" in that connection is largely an absurd invention of the imagination of the novelist. He says:

"There is no such thing as hypnotism by a mere glance or unless the party hypnotized resigns himself voluntarily to the influence, and this process must be gone through with many times before anything like control of the subject is possible; there is no fear that it can be brought about suddenly; it needs persistent influence and works probably only upon neurotic persons."

Of course, effective hypnotic influence could never take place in a courtroom, but something very similar takes place with most people whose minds are under a great mental or nervous strain; for example, in a panic the minds of all are especially open to any suggestion. Professor Münsterberg further points out that the nerves controlling the thought passages to the switchboard or central stations of the brain seem to turn off all opposite currents in their automatic action. For example:

"A suggestion to open the hand expels all idea of clenching it; so a false suggestion to one in a normal state of mind is repelled by many other forces, such as a faithful memory, a sound reason, conscience, and judgment. But in a state of any considerable mental excitement these opposing forces are weakened and the false suggestion, now more feebly combated, takes better hold. Emotion certainly increases the susceptibility of everybody to suggestions; so does fatigue and nervous exhaustion.

“The courtroom is undoubtedly a place of great mental excitement. There is also the nervous desire of the witness to help the side calling him, and anxiety to become an important factor in the case. In this state of mind leading or suggestive questions, either on the direct or cross-examination, are readily accepted and bear fruit. Hence the wisdom of the rule against leading questions on direct examination.”

The psychologist does not need the hypnotic state to demonstrate experimentally how every suggestion may contaminate even the most trustworthy memory. This is well illustrated by an experiment which Professor Münsterberg made with a class of about forty children and adults. They were shown a colored photograph representing the interior of a room in a farmhouse. The photograph was examined individually by each member of the class with instructions that they were to take special notice of everything that was in the room. The picture was then turned face downward, and the class was asked to hand in written answers to questions about what they had observed.

The picture had plenty of detail. The direct questions were simple: “How many persons are in the room?” “Does the room have windows?” “What is the man doing?” There were persons and windows and a man eating soup. But after the direct questions were answered, the first leading and suggestive question brought 59 per cent. of failure. The leading question was put to each member of the class: “Did you notice the stove in the room?” There was no stove, but 59 per cent. of the class answered

"Yes," and having once admitted seeing the stove they proceeded to locate it and tell in what part of the room it was. The walls of the room were painted red. The students, however, were asked whether the walls were green or blue, and this suggestive question seemed to eliminate the true color of the hall from 50 per cent. of the minds.

I quote from one of Professor Münsterberg's articles:

"No doubt the whole situation of the courtroom reinforces the suggestibility of every witness. In much discussed cases current rumors, and especially the newspapers, have their full share in distorting the real recollections. Everything becomes unintentionally shaped and moulded. The imaginative idea which fits a prejudice, a theory, a suspicion, meets at first the opposition of memory, but shortly it wins in power, and *as soon as the suggestibility is exercised*, the play of ideas under equal conditions ends, and the opposing idea is annihilated. Easy tests could quickly unveil this changed frame of mind, and, *if such a half-hypnotic state of suggestibility had set in, it is no wiser to keep the witness on the stand than if he had emptied a bottle of whiskey in the meantime.*"

The whole purpose of Professor Münsterberg's essays is, as he says, "to draw the attention of serious men to an absolutely neglected field which demands their full attention." In the course of time psychology may be able to serve as the handmaiden of justice. But in the meantime there are many practical difficulties to overcome, and it is an intensely interesting and remarkable fact that the jurists

have anticipated the researches of psychology. In reviewing the essays of Professor Münsterberg, Chief Justice Simon E. Baldwin, of Connecticut, says: "The effect of suggestion on a witness is spoken of as something to be understood and explained only by a professed psychologist. The rule of all Anglo-American courts, which excludes questions naturally leading to a desired answer as to a material fact, shows how well jurists have appreciated this particular tendency of the human mind."

A most remarkable case of suggestive evidence, akin to hypnotism, came under my own observation some years ago when I was defending one of the nurses of the Mills Training School, a most estimable young man, who had been indicted for deliberately choking to death a patient in the Insane Ward at Bellevue Hospital. A reporter of the *Journal* had made a contract with his newspaper for \$150. to feign insanity and get himself committed to the Insane Ward at Bellevue Hospital for the express purpose of writing an article upon the treatment of the insane to be published in the *Journal*.

During this reporter's first night in the hospital one of the patients there died, and the reporter conceived the idea of weaving around this occurrence a tragic, though false, story of the abuse of this insane patient which resulted in his death. He claimed that he had seen two trained nurses, one of whom was the prisoner, strangle this patient to death, simply because he refused to eat his supper. He described in great detail how these nurses had wound a towel around

the insane man's throat and had twisted it until the patient was slowly strangled to death. Newspaper pictures, occupying a full page of the *Journal*, were published purporting to show all the details of the alleged process of strangulation by means of a towel, which it was claimed was a common practice at the hospital. The indictment of this young man for murder followed the *Journal* exposure of these alleged hospital abuses. The whole town was wrought up to a high pitch of excitement.

At the trial this same reporter, now as a witness for the prosecution, told his story to the jury, but was so thoroughly discredited and brought to bay on the second day of his lengthy cross-examination that he fled the town and wrote from Philadelphia to his mother in this city that he dare not ever return to New York for fear he would be punished for perjury. This letter, however, could not be shown to the jury, and the fact of the reporter's flight could not be communicated to them.

Once the reporter was out of the way a still more serious situation arose when the District Attorney produced three insane patients from the hospital and called them as witnesses. The court passed upon the question of their intelligence and *allowed them to testify* to all the alleged details of the murder as they themselves claimed to have witnessed it. All three of these insane patients had seen and studied the pictures and descriptions which had been written by the reporter and published in the *Journal*. These pictorial reproductions of occurrences represented as having taken place

in their own ward at the asylum had served as such vivid, though false, suggestions to their diseased minds, already naturally antagonistic to their keepers and nurses, that they afterwards honestly believed and felt warranted in taking oath that they themselves had actually witnessed these very occurrences that had previously been sworn to by the reporter.

These three witnesses, as many people suffering from certain forms of insanity are quite capable of doing, gave their testimony in the most remarkably graphic and convincing manner. It made such a profound impression upon the court and jury, and the prosecution was so bitter and determined, that it seemed almost impossible to prevent a conviction. The jurors, however, carefully chosen by both sides from a "special panel," were unusually intelligent and competent to gauge the false, though sincere, testimony of these witnesses. Scientific and medical testimony, offered in behalf of the defence, conclusively demonstrated that the deceased could not possibly have been strangled to death, and this very long trial was brought to an end by a prompt acquittal of the prisoner.

This case affords a striking illustration of the dangerous effect of leading questions and false suggestions upon minds susceptible to such influences. In this instance that effect might have led to the conviction and possible execution of an entirely innocent and worthy young man. The case was also unique in that perhaps never before in this country had there been called in any one case so large

a number of distinguished pathologists and surgeons, including the late Dr. William T. Bull, who by their testimony conclusively established the scientific and medical facts upon which the defence was chiefly based. Indeed, taken all together, it was one of the most remarkable trials of recent years, but the newspapers, being in a sense themselves on trial, published practically nothing about it.



LORD CHIEF JUSTICE COLERIDGE

CHAPTER IV

LAWYERS

THE witness takes the oath to "tell the truth, the whole truth and nothing but the truth." The jurors' oath is to "well and truly try the issue submitted to them and render a verdict according to the evidence." Both oaths are equally solemn and equally binding.

In other words, the witnesses take oath to tell the truth and the jurors take oath to decide the case on what the witnesses say. The frequency with which juries fail to live up to this obligation is due in no small measure to the lawyers who conduct the trials. It is no uncommon occurrence for a lawyer to try a case for a defendant and for the jury to decide against him. Upon appeal a new trial is ordered on some technicality, and a re-trial of the case is had before a new jury. Meanwhile, the defendant has changed his trial counsel and his new lawyer persuades the second jury to render a verdict in his favor, although both juries heard precisely the same witnesses testify to substantially the same set of facts. Obviously, the change of lawyers brought about this result, and yet had the jurors been able to observe their oaths and to decide the case on the evidence alone, the verdicts should have been the same on each occa-

sion, even after making due allowance for the change in the personnel of the jury.

The prime object of the present chapter is to call the attention of jurors to some of the means, legitimate and otherwise, that are often employed by lawyers to obtain verdicts not strictly justified by the evidence in the case. There is an infinite variety in the methods used by lawyers to obtain these results, and no ordinary citizen can hope to become a competent juror unless he has at least some slight acquaintance with that *genus homo* known as a skillful trial lawyer.

The late Senator George F. Hoar gives a most graphic description of the way Rufus Choate used to sway and capture his juries in his closing arguments:

“It was a curious sight to see on a jury twelve hard-headed and intelligent countrymen,—farmers, town officers, trustees, men chosen by their neighbors to transact their important affairs,—after an argument by some clear-headed lawyer for the defence about some apparently not very doubtful transaction, who had brought them all to his way of thinking, and had warned them against the wiles of the charmer, when Choate rose to reply for the plaintiff—to see their look of confidence and disdain—the averted eye—and then the change; first, the changed posture of the body; the slight opening of the mouth, then the look, first, of curiosity, and then of doubt, then of respect; the surrender of the eye to the eye of the great advocate; then the spell! the charm! the great enchantment!—till at last, jury and audience were

all swept away, and followed the conqueror captive in his triumphal march."

It is almost invariably the case, I can safely say, that, in any protracted trial, the interest of the jury becomes more and more focused upon the lawyers in the case. They become attracted to or repulsed by their personality. The advocates gradually become the principal actors in the drama, much as if they were playing leading rôles on the stage. The litigants—plaintiff and defendant—find themselves receding into the background, and the trial, as it nears its end, becomes largely a battle of lawyers. Even the merits of the controversy seem to take shape and color, in no small measure, according to the jurors' estimate of the fairness, integrity and charm of the respective lawyers.

In part, perhaps, this is because the lawyers are the only ones who can put any real "pep" into a long-drawn out controversy; most of the wit, repartee and fun emanate from them. Many of our judges, when they first don their silk robes and are presented with a judge's gavel as an emblem of their friends' esteem, seem to want to use it on all possible occasions and literally pound out any attempt at banter on the part of opposing counsel as belittling the dignity of the court. I am not referring to a custom that seems quite recently to have come into vogue, I regret to say, for lawyers to stoop to personalities which are little short of billingsgate. I refer to that good natured badinage which, while it injures no one, not even the newly made judge, certainly relieves the monotony of a long court day to the

satisfaction and amusement of every one present. It keeps the jury awake and attentive to what is going on as perhaps nothing else can do. I have always noticed that the older and more experienced the judge the more lenient he becomes with lawyers who occasionally give the jury something to laugh about. By their good natured banterings they create an atmosphere for their side of the case which is dangerously persuasive to the jury.

In England the judges not only tolerate anything that tends to relieve the monotony of the proceedings but take part themselves upon many occasions. Appearing before an English judge, a young lawyer whose memory failed him at the beginning of a long speech which he had prepared in advance, resorted in confusion to repetition of his opening words: "The unfortunate client who appears by me—the unfortunate client who appears by me—my Lord, my unfortunate client—" The Chief Justice, Lord Ellenborough, interrupting, almost whispered in a soft and encouraging tone, "You may go on, sir—so far the court is with you."

By way of contrast to Lord Ellenborough's remark, I am reminded of the story of another judge who, under similar circumstances, said to the embarrassed, hesitating lawyer, "Excuse me for a minute, I am not at liberty to pay you attention," and then proceeded to write a letter to a friend. When he finished, the young lawyer had recovered himself and proceeded to make a very acceptable address to the jury.

If all the witnesses in a case, regardless of motive or inter-

est, had but one object in a trial—to seek the exact truth; if the lawyers were sworn, regardless of party, to do the same thing, and both conscientiously lived up to their oaths, a jury would have a comparatively simple task. But a lawyer always strives to win his cases. He in that way obtains his professional advancement and reputation. His one wish is to smash the other fellow, and he often does not care what means he uses, provided he can smash him effectively. Much of the conduct of the lawyers in trying their cases, however, is to be attributed to the people who employ them. The client expects his lawyer to be a fighter, and wants him to contest every point; one of a trial lawyer's most difficult tasks is to restrain the bitterness and cupidity of his client. Some lawyers seem to have had an almost uncanny power over their juries and an ability to sway them almost at will for the side they represent. Judge Edward Abbott Parry in his "Seven Lamps of Advocacy," just published, quotes Brougham's tribute to Erskine's eloquence before a jury, and suggests that it is perhaps the best pen picture of an English advocate that we possess. He draws attention to how Brougham emphasizes Erskine's power of persuasion, and endeavors to solve the psychology of it. He places in the foreground the physical appearance of the man as the one great factor in his style of advocacy.

"Nor let it be deemed trivial," Brougham says, "or beneath the historian's province, to mark that noble figure, every look of whose countenance is expressive, every motion of whose form graceful, an eye that sparkles and pierces,

and almost assures victory, while it 'speaks audience ere the tongue.' Juries have declared that they have felt it impossible to remove their looks from him when he had riveted and, as it were, fascinated them by his first glance; and it used to be a common remark among men who observed his motions that they resembled those of a blood-horse, as light, as limber, as much betokening strength and speed, as free from all gross superfluity or encumbrance. Then hear his voice of surpassing sweetness, clear, flexible, strong, exquisitely fitted to strains of serious earnestness, deficient in compass, indeed, and much less fitted to express indignation, or even scorn, than pathos, but wholly free from harshness or monotony. All these, however, and even his chaste, dignified, and appropriate action, were very small parts of this wonderful advocate's excellence. He had a thorough knowledge of men, of their passions, and their feelings—he knew every avenue to the heart, and could at will make all its chords vibrate to his touch. His fancy, though never playful in public, where he had his whole faculties under the most severe control, was lively and brilliant; when he gave it vent and scope it was eminently sportive, but while representing his client it was wholly subservient to that in which his whole soul was wrapped up, and to which each faculty of body and of mind was subdued—the success of the cause."

Of Rufus Choate's style and its effect, the Rev. Dr. Hitchcock says:

"Certainly he seldom failed to carry his point with any

jury, but caught them up and swept them along as the wind sweeps leaves and dust. Whoever seeks to know the secret of this will find it preëminently in the innermost, essential character of the man. He was pure and just and true and tender, so that whatever he said commended and still commends itself to what is best and finest in our common nature. He was not only thoroughly good, but his goodness was fine and chivalrous; his fascination was moral, the heart was captured first and after that the imagination. His voice was one in a thousand, ten thousand, rather,—now like a flute for softness and now like a clarion.”

It is often claimed that “the successful jury advocate must to a certain extent be a mountebank, if not a juggler and a trickster.” But I have always found jurors to be in the main, practical, sensible, representative men, fond of fair dealing themselves, and expecting fair dealing from the lawyers who appear before them. They are quick to resent any jugglery, provided, of course, they see through it.

There is one kind of play-acting, however, which is entirely legitimate and which certainly tends to win verdicts. It is indulged in more particularly, perhaps, in the criminal courts, where the greatest latitude is extended to the lawyers for the defence and where they legitimately make use of every possible ruse to acquit their clients. Although in a legal sense criminal courts and criminal trials do not hold the first place, they assume far more importance in the eyes of the general public than those tribunals where the

greater reputations and higher rewards for the lawyers are obtained.

It was in the criminal courts that such men as William F. Howe, the greatest "actor" of his time, made his reputation. He was at the head of the notorious firm of Howe & Hummel, who for many years represented the defendants in most of the celebrated criminal trials in this city. When Howe was at his zenith I was myself an apprentice at the law. But I soon had the good fortune to be appointed an Assistant District Attorney under Mr. De Lancey Nicoll, and was assigned to many of the important murder and arson cases which were tried during the next four years, when crime, among the somewhat better classes, was more than usually prevalent. In that way I came in contact with Howe.

I take it there is no better school than the District Attorney's office of any large city for any young lawyer who is looking for at least an elementary knowledge of human nature, as well as an unusual opportunity for the practice of all those numerous weapons of the advocate that tend to make for success at the Bar.

In those days there were seven of us young lawyers in the District Attorney's office who were assigned to try most of what I may call the more important cases. I fear we were not unlike seven opera singers, certainly all warm friends, but as jealous as cats of one another's successes. Perhaps I came in for a little more than my share of that sort of thing by reason of the fact that, through friendship more than anything else, the best "newspaper cases"



WILLIAM F. HOWE

usually fell to my lot. I was too full of my work to lose my head. I hope there could never be said of me what was said of one of my *confrères*. A lawyer from out of town happened to enter the Court of Appeals while Daniel Lord, Jr., was arguing a case, and inquired of Mr. O'Connor, who was sitting nearby, the name of the lawyer addressing the court. Mr. O'Connor, whose feelings must have been nettled by the progress of the argument, replied: "That, sir, is Daniel Lord, Jr., and he puts *junior* after his name in order that he may not by any chance be mistaken for the Almighty!"

William F. Howe was a most picturesque character. Mr. Choate, on one occasion, when an exceedingly corpulent lawyer was making an argument, leaned over and remarked to his friend, Mr. Strong, "Look at Blank, he *carries all before him*." That is pretty much what Howe succeeded in doing whenever he went into court. He was very fat, with a round, red face, greyish hair, an exceedingly pleasant personality, and a smile for everybody. Howe was always the central figure in any courtroom. I have often wondered what it was that gave him his great power over juries. I attribute it partly to his histrionic ability but largely to his press agent.

There was not a criminal within a thousand miles of New York who had not heard of Howe & Hummel. The gigantic sign over their office door bearing that inscription, although it was almost directly opposite the impressive entrance to the Tombs prison, yet seemed to dwarf even

the temporary abode of most of their clients. The newspapers in those days, especially the illustrated papers and magazines, overflowed with accounts of their cases and their victories. Howe at that time was at the height of his career and was so much in the public eye that, when he appeared in a case, the jury looked upon him with much the same interest and curiosity as they would some celebrated tragedian or successful favorite of the Prize Ring.

A real legal battle with Howe on the other side was always full of dramatic incidents. It was more like a melodrama enacted at the Old Bowery Theatre than anything else I can think of. He and I were opposed to one another almost exclusively in homicide cases. The first day, usually devoted to selecting a jury, Howe would appear immaculately groomed, wearing a light grey sack suit, a bright red necktie, a red flower in his buttonhole and a blue yachting cap. An enormous gold watch chain glittered across his ample abdomen, with a huge gold fob dangling at one end. These, with the smile on his beaming red countenance, fairly lighted up the courtroom.

Howe was a man that every murderer turned to for assistance in those days, much as they did to Montague Williams of Old Bailey fame in London. His clients were often young women of the underworld, and most of the jurors in those days were unwilling to find a verdict of first degree murder against any woman, whatever her station in life. The first day of any trial Howe always let me do all the work; the

more the jurors objected to hanging women the better he liked it. Why bother to ask questions? The first twelve men—any twelve men,—were all his client desired. The jury were thus impressed by his fairness, they could not seem to see that what the wily “Bill” Howe really wanted was variety in the jury box. A merchant, a mechanic, an artist, a bank clerk, an architect, a florist, Jew, Gentile, German, Irish—anyone so long as there was infinite variety. Then let them try to agree, if they could!

As the trial progressed Howe would change his attire, at first from light grey to a steel color. A day later he wore a blue, then a brown suit, and so on until the last day of the trial, when the question of guilt or innocence was to be left to the jury, and then he appeared dressed all in black. A black suit and hat, black necktie, watch chain and cuff links—even a black bordered handkerchief! His countenance accorded with his attire. One would suppose the fate of the universe was in the balance.

Howe’s closing arguments to a jury on such occasions were almost entirely devoid of what is commonly styled oratory. He was in no sense a speech maker, except perhaps according to Daniel Webster’s definition of an orator: “one who makes you think as he thinks and feel as he feels.” But if not an orator, Howe certainly was a consummate actor. It was always claimed that he carried half an onion in his handkerchief. I cannot affirm as to the truth of the accusation; but certain it is that he had a way of squeezing copious tears out of his eyes and letting them roll down his cheeks during his

summing up to juries in a way that seldom failed to excite a quick response, in kind, from them.

Howe used to work very hard in his speeches, puffing, blowing and perspiring more than any lawyer at the Bar, probably on account of his excessive fat. It was amusing, rather than offensive, and tended to rivet one's attention upon him. But it did not arouse the jealousy of his fellow practitioners. Nothing between him and them ever occurred like the repartee between John L. Adolphus and Charles Phillips. When the latter migrated from Ireland and acquired a practice at the English Bar large enough to well nigh monopolize all the best cases at the Old Bailey, Adolphus, in a state of considerable irritation because he found his business falling into the hands of Phillips, said to that gentleman in the robing room: "You remind me of the three B's—blarney, bluff and bluster." "Ah," said Phillips, "you never complained of my bees until they began to suck your honey."

On one occasion Howe was trying a case against Joseph Choate and was employing his well known methods with the jury. It was a warm day and Howe had likely enough had something of a hectic night. During his address to the jury he was puffing and blowing and constantly breaking off his argument to step over to the water cooler for another glass of water. Choate paid not the slightest attention to Howe's antics until he, in turn, rose to address the jury. He began by begging to call their attention to the fact that wind had often been known to raise a great mountain of

water; but, he asked them in all seriousness, had they ever before known water to raise such an amount of wind!

There is a story about Howe's conduct of the defense of a man named Considine that gives an excellent idea of the bold methods by which he won many of his cases. Considine was indicted for murder for shooting a man who had accidentally bumped into him on Broadway during a raging snowstorm. Considine's story was that in the resulting quarrel the stranger attempted to brain him with a cane and that he fired in self-defense. Realizing that no jury would be likely to believe that the stranger was carrying a cane in a violent snowstorm, Howe offered a plea of guilty to second degree murder. This the District Attorney refused.

During the trial it became evident that unless some testimony could be produced which would corroborate the prisoner's own statement that the stranger really carried a cane, there was no hope of saving Considine's life. As a desperate last chance Howe appealed to the Court to compel the District Attorney to produce the cane in court or else give some plausible excuse for not doing so. Thereupon, to his amazement, the District Attorney assured the presiding judge that he had the cane and would produce it in court the following morning. The next day, when the cane was handed to Howe, he knew at once that the handle was heavily loaded with lead. Instantly he raised it high in the air and brought it down with a loud crash, making a deep dent in the

table directly at the side of the District Attorney, who jumped from his seat in unfeigned fright and surprise.

"There!" exclaimed Howe, "I don't wonder, Mr. District Attorney, that you were overcome with fright. How do you suppose my client, Considine, felt when he saw that cane raised to strike him such a blow? Would not any man be justified in using any means for his own defense under such an attack?"

The whole incident was so unexpected and so dramatic that no amount of argument could overcome its effect upon the jury, who promptly acquitted the prisoner.

On one occasion Howe was defending a young woman still in her twenties, who was on trial for shooting her sweetheart. She was the daughter of a Philadelphia parson, but had fallen in love with a married man and had come to New York where she could at least share her lover with his lawful wife and children. The affair had lasted a number of years when, as usually happens in such cases, the man began to show symptoms of growing tired if not of genuine remorse, and to hint at a possible breaking off of the attachment and a return to his home. All the girl's efforts to dissuade him from this course had proved unavailing. Finally, one evening, he had gone into a room to collect some of his belongings, and when he appeared in the hall, satchel in hand, she threw her arms about his neck in one last appeal. He pushed her from him and, drawing a revolver, she shot him dead.

The defence was the same old story. It was he who was rendered half insane by the thought that he must either

return to his home or resign his position in the business he had grown up in. When the final moment of parting arrived, in his despair he had tried to kill himself, and in the woman's effort to snatch the weapon from his hand it accidentally exploded and he fell at her feet.

Throughout Howe's final appeal to the jury the prisoner sat with bowed head, covering her face with both hands and sobbing audibly. Just at the close of his speech Howe went behind her chair, and taking her by the wrists forced her hands from her face, at the same time challenging the jurors to gaze into that heartbroken countenance and see if they could possibly find in it anything that would brand her a murderess. Now Howe usually wore very long, sharply pointed finger nails, and as he snatched the woman's wrists he dug his nails deep into her flesh. The unexpected movement of her lawyer, together with the sudden pain he inflicted, caused the woman to utter a piercing scream that could be heard throughout the court house. It was well on toward ten o'clock at night. Everybody connected with the case was under a high nervous tension owing to the long, strenuous day in court. I was sitting with my back to the prisoner at the moment, and did not realize the trick Howe was perpetrating. It would be impossible to describe the effect this unearthly screech had upon me, steeled as I was to the manufactured defence that Howe was attempting to foist upon the jury. It was as if someone had suddenly put a lump of ice down my back. The jury seemed completely petrified by it, and I saw the case was over from that moment.

About midnight, after the jury had rendered their verdict of "not guilty," and were leaving the court house by the main stairway, I followed them and inquired upon what possible theory they had freed the prisoner. One of them answered, "Why bother about it now, isn't it all over?" I replied that I was in a sense acting for them as District Attorney in my attempt to suppress crime and wanted to learn how our juries looked at such cases, in order that I might do better next time. One of the jurors, who had nearly reached the bottom step, looked around and half shouted back at me, "What to hell difference does it make to you?" "Stop where you are, gentlemen, please," I said, "Just for one moment until I answer that question. It makes just this difference to me. I am trying to find out how it was you convinced yourselves that this woman was *not* guilty, when just before the trial began, she had offered to plead *guilty* if I would guarantee her a sentence not to exceed twenty years in State's Prison." This little speech of mine proved a pretty close second to the lady's scream in its effect on those twelve sheepish looking men.

Less than a month later, Howe and I were at it again. This time the lady shot her lover in the street, the bullet severing his jugular vein. Again we heard the same old defence—but ever new to a jury—of a disconsolate lover trying to take his life for love, the struggle resulting as usual in the death of the male. These stray bullets never seemed by any chance to enter the female form divine.

This prisoner was even prettier than the one the previous

jury had acquitted. She was a woman of what is commonly called doubtful character, although in her case there was no doubt about her character whatsoever. She made a tragic figure dressed in black satin. Her cheeks were deathly pale. Her feet and ankles were immaculate, and as she sat in the witness box for fully half a day, while she was explaining the circumstances that led up to the shooting, she took good care that the jurors should not overlook any of her feminine charms. All the time she was keenly alive to what was taking place, and her expression of terror when evidence was going against her was most pathetic. I felt the case slipping away much as the previous one had done. Mr. Justice Ingraham was on the Bench. He had a certain fondness for Howe and fully appreciated his talents. He even intimated in the presence of the jury his implicit confidence in any statement Howe might make. Nevertheless, he was quick to see through the woman's defence, and I was confident he would give me great latitude when the time came for me to sum up to the jury.

I told the jury in great detail what I knew about the prisoner's lawyer, his methods with juries, the deceptions he had successfully carried out in the various cases we had tried together—all in such laudatory terms of Howe, as an advocate, that even he seemed rather pleased with himself than otherwise. It turned out that I was right in my estimate of that jury. All they needed was to be convinced that the whole defence had been staged purely for its effect upon them, and a quick verdict of guilty followed.

A few years later Howe died in poverty. His personal earnings were large for those days—over \$50,000 a year, I am told on good authority. But there was no one dependent upon him, he was a generous, free spender, and he frittered his money away upon the most absurd extravagances that he used to import from his native country. He was of English birth and it was always said he came to this country as a ticket-of-leave man. However that may be, he certainly left an imprint upon the records of the criminal courts of this city, which no one has ever equalled. He was *sui generis*. There will never be another “Bill” Howe.

When my friend, Horace Russell, afterwards a Superior Court Judge, first came to New York, through some political influence or other he became an Assistant District Attorney. One of the first cases he was assigned to happened to be a homicide case with the invincible Howe on the other side. Russell was a bright young lawyer, but had only practiced law for a few years in some small city “up state,” and admitted he knew next to nothing about the practice of the criminal courts. He had never before even witnessed the trial of a murder case, much less conducted one himself, and he soon discovered he was no match for the veteran Howe, who was carrying everything before him.

The trial lasted several days, and when Howe had finished his closing argument to the jury, Russell realized the case was hopelessly lost. He told me that he decided not even to attempt to reply to any of Howe’s arguments. In-

stead he rose and quietly addressed the jury somewhat in this fashion:

“Gentlemen, you have listened, as I have, with the greatest interest and attention to the argument of my learned opponent. I can see in your faces the effect Mr. Howe has produced on you and that you have already made up your minds to acquit the prisoner. I realize it would be useless for me to attempt to persuade you to alter your convictions. Nevertheless, I am absolutely convinced of the prisoner’s guilt. I feel that your verdict will be the result of two very persuasive factors. In the first place, as you see, I am a young lawyer just down from a small country town, and it must be equally apparent to you that I know next to nothing about the proper way to conduct a trial of this importance. On the other hand, I have opposed to me one of the most experienced and resourceful trial lawyers and pleaders that our courts have produced in many years. Before you retire to the jury room, however, I want to put just one thought in your minds. It is now seven o’clock. By nine o’clock to-night you will have rendered your verdict of “not guilty” and will have departed for your homes. At just about that hour tomorrow morning I shall see the great and only “Bill” Howe walking into my private office, upstairs, at the end of a big black cigar, with that inimitable smile beaming all over his face. He will lean back leisurely in one of my chairs, put his feet up on my desk, and say: “Horace, what perfect damn fools those jurymen were!” Russell deservedly won his first criminal case.

At one time Sir Henry Hawkins was almost equally successful as a defender of criminals in the English Courts. On one occasion, by having the prisoner's children present in the courtroom, instructed to weep all during his summing up, by his pathetic references to these weeping children he so worked upon the sympathies of the jurors that they promptly set the prisoner free. A few days later a friend told him he had been walking in the neighborhood of the prisoner's home during the early days of the trial and had seen these same children playing at hanging a cat, at the same time singing at the top of their voices, "This is the way Daddy will go."

There is no court in the civilized world comparable to the Old Bailey in London, where so many dramatic trials of every imaginable form have been enacted. About a hundred years ago the Old Bailey had come to be looked upon as something in the nature of a free theatre. Its sessions were attended by all ranks and classes from royalty down. Sometimes, it is said, a pound was willingly paid for a seat in the gallery during a famous trial, when princes sat on the benches as spectators. Charles Kingston, in his absorbing book on the "Dramatic Days at the Old Bailey," recently published, says:

"I remember one session when the convicted persons included the son of a Marquis, a West End physician, a dock laborer, a domestic servant, and a solicitor who had been educated at Eton and Oxford. All went 'down,' to use the police expression for conviction, to mingle together for an

hour or two, and then to be sorted and dispatched to various prisons. Every conviction meant a tragedy and the breaking of more than one heart, for even the worst of men have someone to love them in the depths."

It was in the Old Bailey that Montague Williams had a succession of victories somewhat similar to those of William Howe in our own Sessions Court. Williams' favorable verdicts seemed to arouse the jealousy of his contemporaries. Among them was a criminal lawyer whose clients, especially when tried for murder, were almost invariably convicted; and the story goes that one day he boasted in the hearing of Williams, "I have been forty years at the Bar, and I have never had a complaint about the way I have looked after my clients' interests." "That is because dead men tell no tales," retorted Williams.

Kingston describes Williams' style of oratory as that of "thunder and lightning," and says that it exposed him to innumerable shafts of wit. "Splendid, my dear Monty," once drawled Sergeant Ballantine at the conclusion of one of Williams' Old Bailey speeches, when the flushed and perspiring barrister was panting for breath. "If the jury will only mistake perspiration for inspiration, you should score a galloping acquittal."

Mr. Kingston relates an occurrence which took place in a London Court, which is so excruciatingly droll that I cannot resist the temptation to repeat it. During the progress of a murder trial, a witness was asked what he had said to a person at whose house he had called. The question had no

sooner been put by counsel for the prosecution than the defending lawyer jumped to his feet, almost white with well simulated passion, to protest against it. His Lordship ordered all the witnesses out of the courtroom, while for a full hour counsel and judge discussed the knotty legal problem as to the competency of the evidence. Learned authorities from the seventeenth century onwards were cited and points of view were contrasted with much acerbity. Eventually the judge decided that the question was proper and that it must be answered. Accordingly, the witness was brought back into court and placed in the box. Counsel rose and, with that extra solemnity and self-importance befitting the victor of a fierce and acrimonious debate, asked what the witness had said to the gentleman on whom he had called. "He was out, sir," was the answer.

Chief Justice Coleridge once said to Sir Charles Russell that he considered him "the greatest lawyer of the century." Even Russell was not above play acting before juries. According to O'Brien's biography, Russell attended to the smallest detail in every case; he forgot nothing, he overlooked nothing. Once he was engaged in a breach of promise action. As soon as his junior and the solicitor had seated themselves in his room for consultation he turned to the latter and asked, "What is your client going to wear at the trial?" The solicitor replied that he had not the faintest idea. Russell then said, "Take her tomorrow to her dressmaker and order a perfectly plain dress of a soft grey color, fitting closely to the figure, without any

trimming, and a big black hat, also as simple as possible." The consultation was very short and the case itself was practically not discussed at all—indeed there was little to discuss in it. Russell's client got a verdict for £10,000. In divorce cases he thought ladies ought to be dressed in black. He used to say that at least they ought to pretend to be sorry.

We all remember a certain Mrs. Harris who vainly attempted only last spring to defend the suit brought by her husband, a former vice-president of the City National Bank, to annul their marriage. The action was based upon his wife's failure to disclose to him her alleged profligate life before their marriage. All through the ten day trial Mrs. Harris was allowed by counsel to come to court gaily attired, and to spend the major part of her time in the courtroom using her powder puff, lip stick and pocket mirror. I am told that her husband went through the trial without the faintest idea that he could succeed against the woman in the case. But if he had known more about juries he would have realized that his wife was daily lip-sticking away any possibility of a verdict in her favor.

During my last year in the District Attorney's office, I again encountered Howe in a most sensational and dramatic murder trial of a man by the name of Webster. He was a bookmaker at the race tracks, if not an all around gambler. He had fallen in love with a woman of easy virtue named Evelyn Granville. A few years before she became Webster's mistress, Miss Granville had been one of the most beautiful *demi-mondaines* in the city; but she was already on her

downward path when she went to live at a fashionable apartment house as the pretended wife of Webster. A year or two later Webster began to tire of his bargain. Evelyn appreciated this and made up her mind that she could best hold her lover by reviving his interest through jealousy.

Accordingly, one evening, she taunted him with the information that a rich young bachelor, living on the same floor with them, had attempted to carry on a flirtation with her in the elevator. Webster, who had been drinking, immediately came to the conclusion that at best he was probably hearing but half the story and proceeded to rush across the hall to interview his imaginary rival. By this time Evelyn realized that she had gone too far. She followed him into the hall, where she saw the door of the bachelor's apartment open and Webster just in the act of emptying the contents of his revolver into the rival's abdomen.

I am omitting the bachelor's name because he was a young man of most excellent character and social standing. There was not the slightest foundation for the story with which Evelyn had aroused her friend's jealousy. Mr. Blank was mortally wounded, and as he fell to the floor, he stumbled over a china cuspidor, that suggested to the wily Howe the only means for Webster's escape; for, like all other murderers in those times, Webster immediately sought the assistance of the famous "Bill" Howe. The defence was promptly concocted to suit the occasion. Webster, hearing that his "wife" had been insulted that afternoon in a public elevator, had gone to Mr. Blank's room for the purpose of remonstrating with

him, but as the door was opened and Mr. Blank recognized his visitor, he immediately seized the cuspidor and attempted to smash it over Webster's head. The latter simply drew his gun and shot in self-defence. As Evelyn Granville herself was the only eye-witness to the shooting, Howe had a very good chance to "put over" this defence on any inexperienced jury.

The first trial resulted in a disagreement, eight of the jurors holding out for acquittal. The case was tried before one of the weakest judges then sitting in the General Sessions Court. It was one of the most cold-blooded, deliberate murders of the winter, and the public prints were clamoring for a second trial and a conviction. We removed the case to the Supreme Court, persuaded Mr. Justice Ingraham to preside, and I had the misfortune to have the second trial fall to my lot. Meanwhile, the flimsy story of a common law marriage, which Howe had invented for the purposes of the first trial, had been followed by a genuine marriage which took place at the Tombs Prison, by Howe's special arrangement. To complicate matters further, a child had been born, so that by the time the case was reached for re-trial Howe had these additional weapons for an appeal to a jury's sympathy.

After the jury had retired to consider their verdict, word was brought to us that there were at least a dozen gamblers waiting in the hall below, fully armed, with the intention of rescuing the prisoner in case a verdict of first degree murder should be rendered against him, and, if necessary, to shoot

both Mr. Justice Ingraham and myself. The jury returned, and the prisoner was placed under heavy guard. However, the verdict was "manslaughter," entailing an imprisonment in State's prison for not more than twenty years, and there was no courtroom demonstration. The jury evidently came to the conclusion that the shooting had been in the heat of passion, and that the woman in the case was probably more to blame, if anything, than the prisoner at the Bar.

By this time I had become firmly convinced that, in every trial in which I had been opposed to Howe, his defence had been simply a tissue of lies, with just enough foundation of fact to make the perjury fit in naturally in the eyes of the jury. His office was a veritable cesspool of perjury; but to be perfectly fair to Howe himself, I do not think he took any active personal part in it. Being an Englishman, he regarded a trial lawyer's duties as they would exist in his own country. He constituted himself a barrister, pure and simple, and never saw any of his witnesses before they took the stand. He always had two or three of the young men of his office prompting him as to what the witnesses were willing to swear to, and I think that to this extent, at least, he must have persuaded himself that he was keeping his hands comparatively clean; although it is impossible to conceive that he was entirely unaware of the perjury that he was indirectly foisting upon his juries.

It seems almost as if the following anecdote might have emanated from Howe's office. If not well founded, at least it is well found. The story is told of a Jewish practitioner

from White Chapel, who on delivering to a friend the brief for the defence in an Old Bailey case said: "If you think the hevidence is not strong enough, Mr. ———, just tell me vat you vant. I have some fellows around the corner ready to swear to hanythink."

I realize I have digressed somewhat from the subject in hand, but my purpose in relating these different trials, somewhat in detail, is to afford a striking illustration to jurors, when they are called to serve in our criminal courts, of the methods employed by a branch of the profession rather aptly styled criminal lawyers, to play upon their sympathies and persuade them to render verdicts of acquittal based upon wholly imaginary defences.

After what I am pleased to call my graduation from the criminal courts and my entrance into private practice, I made up my mind I never again wanted to be connected directly or indirectly with any such heartrending dramas as are there enacted, with all the elemental passions of love, hatred, jealousy, greed, and revenge as their daily theme. Barely a year later, however, I received a sudden summons to go to Canada to look after the interests of two young American boys who had fallen into the hands of the Crown authorities. These two young men were twins and belonged to a wealthy New Orleans family. Upon arriving in Toronto I found that these boys were about to be tried for murder and that several of the leading lawyers of Canada had already been engaged as special counsel for the Crown. Among these was Mr. Osler, a brother of the famous Sir William Osler, professor

of medicine at Oxford University. Chauncey Depew said of this Canadian lawyer that he considered him the greatest criminal prosecutor in the annals of Canada. He certainly was great in one sense, for he was six feet three inches in height. But he was a savage, relentless, heartless prosecutor.

The Canadians were not accustomed to speedy American methods. Perceiving early in the course of preparation that the trial would eventually resolve itself into a battle between medical experts, before the Crown was aware of it I had engaged on my side of the case practically all of the leading surgeons and doctors in that vicinity.

These two boys had migrated from New Orleans and had started out in the warehouse business in Toronto. They were being prosecuted for the death of one of their employees resulting from an attempt to tinker with the machinery of a freight elevator in their building. The contention of the Crown was that these boys had carefully planned and staged the accident which occurred, the death of their employee enabling them to collect a life insurance policy of \$30,000 which had been taken out in their favor but a few months before. The trial lasted thirty days and not less than ninety-two witnesses were called on one side and the other.

At the close of the case and after the jury had retired, I met Mr. Osler in the robing room and told him that I had engaged a special train to take the prisoners back to the United States the following day, provided they were fortunate enough to be acquitted, and I asked him if he knew of any

reason why I should not do so. He was parading back and forth at the time so rapidly that his silk gown was almost at right angles to his body. He turned on me quickly with the curt remark: "Mr. Wellman, you need give yourself no further anxiety about these two young countrymen of yours. We do things very differently here in Canada than you do in the States. These two young men will hang just outside this courtroom two weeks from tonight." Osler was doubtless a great lawyer, but he was a poor prophet, for my "two young countrymen" left with me the following day on the special train, and to the very minute.

It is a great pleasure to remember the hospitality and courtesy of the Toronto Bar toward a member of their own profession from the States. During my three months in Canada I was constantly fêted. I was the guest of honor at a dinner given by two hundred and fifty members of the Toronto Club. The Lieutenant-Governor invited twenty-three members of Parliament to meet me at dinner at the Government House and I received frequent invitations to social dinners, sometimes finding myself seated opposite the very judge who was presiding at the trial. But there was never the slightest reference to the court proceedings at any of these functions, public or private.

The Toronto newspapers from the start evinced a very strong prejudice against my clients, voicing what seemed to be the sentiment of pretty nearly everybody with whom I came in contact. During the court recesses, on several occasions, I noticed the judge reading the *New York Herald*.

Accordingly, I telegraphed for a *Herald* reporter to come at once to Canada to report the trial for the New York papers. As the defense was paying all his expenses, I was able, to a certain extent, to mould his impressions of the evidence; and I took special pains to see that he made frequent reference to the extreme impartiality shown by the presiding judge in the conduct of the trial. I even succeeded in buying a photograph of the judge, taken in his robes, and had it reproduced in the *Herald's* accounts of the trial. It was with no little satisfaction, then, that I thought I could detect just the suggestion of a smile on the judge's face as he read the *Herald's* reference to the "British fair play" shown toward the American boys on trial for murder in Canada. If the judge, at the start of the trial, actually did share in the general prejudice against the prisoners, I was sure it had all been removed when I heard his summing up to the jury. He gave us the benefit of every doubt, and there was not a single incident in our favor during the long trial that he failed to call to the attention of the jury.

At the present time, we have in New York City what we call a "Special Jury." In the city proper there are 3,500 in this class of jurors. In Brooklyn there are 500 more. The Special Jury is made up of carefully selected men who have had long experience as jurors, and when there arises any particular case in the criminal courts where a conviction is particularly to be desired, the District Attorney asks for a special panel. In New York they are called, by those "in the know," the "Convicting Jury;" in Brooklyn the "Blue

Ribbon Jury." It was from one of these special panels that the jurors were selected in Brooklyn in the recent homicide trials growing out of the shooting of bank messengers at one of the elevated railroad stations. It will be remembered that these Diamond brothers, with their confederates, were tried and convicted in record time and sent to the death house for prompt electrocution. Of course, the theory of these prompt convictions and executions is not so much the desire to hasten the punishment of the offenders as it is to serve as a forceful example and deterrent to others.

While, at first sight, the use of these "convicting juries" may seem open to criticism, they are really made more or less compulsory by the failure of inexperienced jurors to render verdicts of guilty, where the evidence warrants such a result, through some such excuse as that the punishment seems to them too severe. This excuse is often given, although jurors ought to realize that they have nothing whatever to do with and no responsibility for the severity of the punishment, that being solely the province of the courts and legislatures.

Only the other day in Judge Franklin Taylor's court in Brooklyn a jury acquitted a prisoner on trial for burglary, who had a prison record of three distinct terms. This verdict was severely criticized by the presiding judge as obviously against the weight of evidence. As a sequel to this acquittal, the very same burglar, only a month later, was discovered by the police sleeping with all his clothes on in a vacant house whose owner was absent in Europe. Beside him lay silverware, jewelry, furs, etc., to the value of many

thousands of dollars which he had collected. He had fallen asleep apparently while waiting until night for an opportunity to escape safely with his plunder. An open coal hole had attracted the attention of a patrolman, who, upon investigation, discovered and arrested the burglar.

It is such occurrences as these that rouse anew that ever present body of opponents of the jury system to urge upon the public some radical change in the existing methods of selecting jurors, such, for instance, as the establishment of civil service lists, compelling all jurors to measure up to certain high standards of education, ability and character. On the other hand, the time honored maxim that "it is better that ninety-nine guilty men should escape than that one innocent man should be convicted" must never be lost sight of. Nor should we allow these occasional miscarriages of justice to blind us to the infinite advantage, in both civil and criminal cases, of choosing our juries from the people at large. Judging from my own experience, there can be no safer tribunal to decide the ordinary rights of liberty and property than a body of twelve honest men who are chosen from as many different walks of life and who fairly represent the average intelligence of the community in which they live.

Judge James M. Morton, Jr., of the Federal Court of Boston, recently told me of an experience he had before going on the Bench that is full of vital interest to jurors who serve in criminal cases with the humane desire to protect the innocent.

"I was assigned to defend a man named Howard, who was

indicted for murdering his wife, Ida Howard. Her body was found one morning floating in a tidal river near a deserted summer resort, late in the fall. The autopsy was rather inconclusive, indicating either drowning or strangulation. The place where the body was found was five or six miles south of New Bedford; the woman was living with a family on a farm four or five miles north of the city. It was clear that she passed through the city on the night of her death. The defense was suicide and an alibi. The Government called as a witness a woman who was a spiritualist medium. She testified that on the evening in question Ida Howard had come to her office about nine o'clock, had told her that she had an appointment to meet her husband near the place where the body was found in order to look at a house which he could get for nothing for the winter; and that she felt apprehensive and wished advice whether to go.

"There was no satisfactory identification of the prisoner at or near the place of death; and no other reason why the woman should have gone there unless in a state of distraction for the purpose of killing herself. Plainly the medium's story was hanging evidence, if believed. Obviously there was no avenue of direct attack upon it,—the other party to the conversation was dead. The presence of the dead woman, at or about the time stated, in New Bedford was altogether probable. The only way of dealing with the testimony that occurred to me was to try to make the witness ridiculous and give the impression that she was lying for the sake of the notoriety which it would bring her. It was a fact that she

had not told her story promptly, having waited a month after the death before telling it to anybody and then telling it, not to the police, but to some reporters.

"I sized her up as a very quick witted and rather quick tempered English woman of the working class. I examined her for a few minutes on immaterial matter in a rather uncivil way, which caused her to lose her temper. I then put the question, why, after having withheld her story so long, she finally told it. I knew what the answer would be and I got it: that the spirit of the dead woman appeared to her repeatedly and told her that she must tell the story. I did not anticipate the wave of emotional credulity with which this statement was received by the crowd in the courtroom; it almost knocked me off my feet. I have few more disagreeable memories than of the few seconds which followed when I was trying to keep my footing. The examination then proceeded as follows:

Q. 'You are sure it was Ida Howard?'

A. 'Yes.'

(The witness was pleased by the impression which she had made, and was confident.)

Q. 'Did you see the spirit?'

(This was the crucial question. If the witness says she did not see, she will have to explain, etc.; if she says she did see, it leads to less obvious but greater difficulties. She realized the difficulties of the answer no, and so she answered affirmatively.)

A. 'Yes.'

Q. 'You saw the spirit plainly?'

A. 'Yes.'

Q. "Was it a plump looking spirit about five feet four tall?"

(Ida Howard's description. The witness fenced for a moment because she saw where she was headed, but finally answered.)

A. 'That's what it looked like.'

Q. 'Did it wear a hat or a halo?'

(Some of the audience laughed and several of the jurymen smiled. The witness's jig was up. She answered.)

A. 'It 'ad no 'at.'

"I examined her for fifteen minutes or so about whether spirits had clothes, whether we might regard millinery styles as endowed with immortality, etc., and finally let her go amid contemptuous ridicule.

"When I argued to the jury, I told them that if the witness believed she could raise the spirit of the dead, her place was in Taunton Insane Asylum; if not, in State Prison, and either way, with a man's life at stake, what she said was unworthy of credence. I have always supposed that the cross-examination saved the prisoner's life."

CHAPTER V

LAWYERS (continued)

In the District Attorney's office it was always more difficult to get convictions the first two or three days of a term of court. So that the jurors might have sufficient experience to acquire the spirit of convicting, it used to be the habit of the District Attorney's assistants to keep their important cases until the last days of the term. By that time they would have become acquainted with the jurors, would be able to single out the convicting jurors from the softer hearted acquitting ones, and would also have come in contact with the entire panel on that dangerous ground of intimacy that arises between any set of jurymen and a District Attorney whom they soon come to regard as, in a sense, one of their own number in his attempt to suppress crime in the neighborhood where they all live. This always was and I suppose always will be an inestimable advantage to the prosecutor.

But I venture to warn jurors against this, in effect, unfair advantage and to urge them to try to steel themselves against this influence in their conscientious attempts to arrive at just verdicts. They should realize that the District Attorney's office is made up of fifteen or twenty young trial lawyers who have accepted the official position for the very purpose

of getting experience in the conduct of jury trials and in examination and cross-examination of witnesses, with the one thought in their minds of making a reputation for themselves. They become naturally,—it is only human that it should be so—desperate prosecutors. They regard each important verdict as another scalp in their belt, and I cannot caution jurors too strongly against the habit of blindly following the lead of the Assistant District Attorney who technically appears on the side of the people.

To obtain a verdict of “not guilty” under these circumstances is something any lawyer may be proud of, for it must be remembered that no man is placed on trial for his life unless there is at least strong presumptive evidence of his guilt, and from first to last the lawyers for the defence are fighting against terrific odds. The lawyers may joke and even the judges, but none can forget that a human life is at stake; the nervous dread of what may happen is not confined to the prisoner at the bar.

Nevertheless, in my time there were some District Attorneys who never could seem to get a jury worked up to the point of rendering a verdict of murder in the first degree with consequent sentence of death. Time after time, in premeditated murders, the jury would return verdicts of manslaughter or murder in the second degree, and the various assistants came gradually to be rated by their ability to get verdicts involving the death penalty. One can readily conceive the exultation that comes to a young, ambitious lawyer, when he has succeeded in convicting a

clever criminal, who he is thoroughly convinced is guilty and a very real menace to the community. But great as this thrill is, I am proud to say that in my own experience, the thrill of acquitting one about whose guilt one has any real doubt is still greater.

It is well for jurors to remember, when sitting in criminal cases, that there are some perfectly honest, conscientious judges on the Bench who nevertheless are known as "convicting judges," and, on the other hand, there are judges whose lenient, kindly disposition more or less unfits them to sit in any kind of a criminal case. These convicting judges are well known to the District Attorneys, and by their system of controlling the calendar, it readily happens that the important cases are invariably called to trial before the sterner judges. It should be remembered also that these judges become personally very fond of the assistants who appear constantly before them, and one could hardly expect them to resist the temptation to help the prosecution, perhaps without appearing to do so, in cases where they are satisfied of the prisoner's actual guilt.

Nobody could do this with greater subtlety than the late Recorder Frederick Smyth, of whom I shall speak in some detail in another chapter, or the late Supreme Court Justice George C. Barrett. Their "records" would always appear on appeal absolutely fair to the prisoner, and yet the tone of voice, the manner and the whole atmosphere of the trial, so far as it emanated from the Bench, was for conviction in every meritorious case. As one clever wit put it, "In the

courtroom where these judges sat the very microbes on the wall began each trial by singing a pæan of 'Guilty.'"

On one occasion the Irish lawyer Curran was lunching at the same table with one of these judges, who asked Curran, "Is that beef near you hung beef?—for if it is I would like to try it." Whereupon Curran replied, "If you try it, your Honor, it is sure to be hung!"

One thing can be counted upon as well nigh certain, and that is that an innocent man is rarely, if ever, convicted of murder. The story goes that when Calcraft, the public executioner in England was asked if he had ever hung an innocent man, he replied that he could not tell, but he was sure he had had no complaints!

The jurors themselves have it in their power to correct these apparent abuses simply by taking pains to acquaint themselves with the nature of their duties in the jury box. Let them steel themselves against the blandishments of the prosecuting attorneys on the one side, as well as the tricks and subterfuges of the lawyers on the other, and while giving strict attention to and implicitly following the instructions of the judge as to the law, yet make such allowances as they think proper for his personal trend of mind.

No juror who has never sat in a murder trial can picture to himself accurately the atmosphere of intense solemnity and excitement the whole proceeding assumes toward the closing days of the trial—the pallid, frightened look of the prisoner, the weary, anxious expression of counsel, the solemnity of the presiding judge, the tears and hysterics of

the women awaiting the verdict, the oppressive silence of the courtroom.

The prisoner himself is usually the last witness in his own defence, if his counsel is so inexperienced or venturesome as to subject him to such an ordeal. It is strain enough upon any witness, unaccustomed to a courtroom, to mount the witness stand, tell his story and submit to the cross-examiner's attempts to confuse and trip him. But when a man is on trial for his life, with visions of the electric chair or "the rope," as they call it in England, constantly before his eyes, no juryman can be too lenient in his judgment of such a witness, innocent or guilty, who is at all times fighting for his life, and fighting under the most trying circumstances it is possible to imagine.

I have seen so many prisoners on trial for their lives who convicted themselves while testifying in their own behalf, that I feel like recommending strongly the adoption of the former English rule barring a prisoner accused of a serious offence from taking the witness stand in his own behalf, but allowing him to make a statement of his defence from the Dock, not under oath and not subject to cross-examination. Such a rule was obviously for the prisoner's benefit and was a most humane effort to protect the innocent. It removed the dilemma faced by the accused of risking a poor showing on the stand, even though innocent, or else of suffering from the inevitable inference to be drawn from silence.

There has seldom been a trial in our local criminal courts

which aroused so much public interest and discussion as the trial of Carlyle W. Harris for the murder of his young wife. Harris was a medical student at the time of his indictment. He had shown more than ordinary ability in the medical college, and as he was the grandson of one of our leading surgeons, there were great possibilities of a successful career ahead of him. He became attached to Helen Potts, a pretty and attractive girl attending one of the fashionable girls' finishing schools in this city. Harris himself was an uncommonly engaging chap and had had great success in his pursuit of the young women of his acquaintance before he met Miss Potts.

In order to overcome her scruples he finally proposed a secret marriage. Her subsequent pregnancy, abortion, and confession to her mother brought about a situation where Harris was called upon to make his marriage public. He succeeded in persuading the girl's mother, on one pretext or another, to continue the secrecy of the marriage until finally—the mother becoming importunate—all further excuses would have failed had not his wife been taken suddenly ill and fallen into a deep coma from which she never awoke. Miss Potts had been suffering from headaches, and it was discovered after her death that Harris had advised her to take some capsules of quinine which he had himself obtained for her. It was after taking one of these capsules that her school girl friends were unable to rouse her. Chemical examination of her stomach and intestines disclosed the presence of morphine, but no quinine.

Harris was charged with the murder of his wife, and after a most dramatic trial which lasted three weeks and was the consuming topic of the day, he was convicted and subsequently executed. A detailed account of the trial with all the speeches of counsel was promptly printed in pamphlet form and five thousand copies were sold almost over night.



Mr. Taylor

Prof. Witthaus

Mr. Purrington

Mr. Jerome

Mr. Wellman

Mr. Simms

Clerk of Court

Dr. Hamilton

SCENE AT TRIAL OF CARLYLE W. HARRIS

Recorder Smyth, who presided at the trial, told me in after years that he frequently, in leisure evenings, took this pamphlet from his library shelves and amused himself by reading the evidence and speeches, though he modestly refrained from mentioning his own masterly presentation of the evidence in his charge to the jury. I quote the peroration of the closing speech for the prosecution in this remarkable trial:

"Now gentlemen, pause here. It is pretended by Mr.

Taylor, in solemn mockery of your intelligence and manhood, that you should acquit his client because throughout all the nine months that Harris has been in prison and throughout this long trial he has always maintained his self-respect, and could look into the eyes of each jurymen with a confidence and assurance which, in Mr. Taylor's judgment, could only arise from a sustaining knowledge of innocence in his heart. Mr. Taylor said, likewise, that the prosecution had poured into this case a 'tide of filth and slime.' I ask him out of whose mouth came this tide of filth and slime? The People's witnesses have but repeated the words spoken to them by Carlyle W. Harris; and if throughout all this case he has retained his self-respect, I ask you what other man in this courtroom has retained his respect for Harris? Is he innocent because he can look a jury in the face? Why, could any man whose conscience wasn't fairly choked in his breast look any honest man in the face after there had been proved against him what has been proven in this case against Harris? This is not innocence, to my mind; it shows an utter lack of conscience and of feeling; enough has been proven here to make any man hang his head in shame before the public and a jury of respectable gentlemen.

"But, gentlemen, I beg you will pay no attention to anything I have said that is not fully justified by the sworn testimony; pay no attention to anything in this case but to the inner voice of your own consciences, and to that sense of duty which you owe to God and to man upon this occa-

sion. If all these facts and circumstances lead your minds to a conclusion of this man's innocence, or raise that fair and reasonable amount of doubt to which he is entitled, in God's name acquit him and set him free. But if, on the other hand, all the testimony of the witnesses in this case together with the admissions out of the defendant's own mouth, when weighed in the even scales of justice, convince you of his guilt, then and then only I ask for a verdict of guilty at your hands,—for the protection of the good, of the virtuous, for the repression of the evil and the wicked, I ask that verdict by which alone, as it seems to me, the demands of public justice can be satisfied.

“I well remember once seeing an old engraving, an English picture, which represented the first trial by jury. The twelve men were assembled in the open field; no house enclosed them. It was a murder trial, but it was far different from this murder trial, for here we have the accused and his family and friends sitting about him and appealing to you for your sympathy. There the jury were collected on the commission of the crime, and at their very feet lay the body of the dead. One relative of the deceased was bending over the lifeless form, her locks falling upon his face as her tears fell in her agony of grief. A male relative stood over the prostrate form pointing with one hand to the accused and with the other to the gaping wound through which the life tide had gone. That was an ancient trial by jury; and here, in closing this trial, I ask you to remember the dead. I ask you to walk with me by the grave of this unfortunate girl.

Let us there, with bared heads, say a few words in memory of her innocent young life,—of her who had the right to live for years in this garden of God's beauty, suddenly taken off and hurled into eternity. Let us write an epitaph on her tomb: 'Murdered innocence.'

"Would to God, gentlemen, we could call her back! Would to God we could bring her back to life once more and could put her loving hand in his, and send them out into the bright world forgiven, wiser and better for this sad experience, to live their lives together as man and wife, according to God's holy ordinance. But it is too late. She is gone. Her lovely spirit has left the earth. The die is cast. A terrible doom has settled over this defendant. And we can now only listen to the command of the great Jehovah: 'Whoso sheddeth man's blood, by man shall his blood be shed!'"

In a subsequent chapter I make reference in more detail to many of the circumstances surrounding this tragic, romantic murder.

The impression made on the public by this trial was evidenced in two somewhat unusual ways. The amusing one was this: I had gone to Lakewood, New Jersey, for a rest after the arduous trial. A colored bell boy carried my satchel to my hotel room and to my surprise recognized me, no doubt from the newspaper prints of the trial, for he began repeating to me in loud tones portions of my own summing up to the jury.

The serious incident occurred some years later. I was

selecting a jury in one of the Federal Courts, where a lawyer expects and usually finds a particularly high class of jurymen. I excused but one juror. He looked inquiringly at me as he left the jury box, and instead of leaving the courtroom, remained in court until the mid-day recess. He then approached me and asked why had I excused him from the jury. The question was an embarrassing one, but I mildly suggested that I was really unable to say—that perhaps there seemed to me to be a certain telepathic something between us that made me feel we would not get on very well together. To this remark the talesman replied, “You were entirely right; I would never have given you a verdict in this case or any other in which you appeared before me.” I pressed him for an explanation, and he finally admitted that he was prejudiced against me because he felt I had “murdered Carlyle Harris.” He admitted he knew no one connected with the trial but had drawn his conclusions solely from the newspaper accounts.

I persuaded him to sit down and discuss the case. I told him of important facts which must have been unknown to him because the rules of evidence kept them out of the trial, such as the statements of the girl herself when she found herself losing consciousness after taking the poisoned medicine. I assured him that we had an exceptionally conscientious panel of jurors; that, after the trial, one of them had even told me that he prayed each night that he might see the truth and do no injustice to the prisoner. Finally, when he heard that this same juror had confided to me that

the jury all felt that my own fairness toward the prisoner throughout the trial had done more than any one thing to bring about the final agreement among them, my friend seemed to lose his prejudice. And I had lost my lunch hour.

I speak of this incident only because of the remarkable light it throws upon the branch of the subject we have been discussing. Here was what appeared to be a perfectly honest, educated jurymen making the appalling statement that—simply because of his prejudice toward a lawyer whom he did not know but had read about in the public press—he was prepared to discard all consideration of the merits of the litigation he was called upon to decide, and would have rendered a verdict based solely on the prejudice he entertained against one of the lawyers.

Close upon the heels of the Harris execution, one Dr. Buchanan made up his mind to get rid of his wife, not as clumsily as he thought Harris had done—by the use of morphine alone, which contracts the pupils of the eyes symmetrically to a pin point,—but by a combination of morphine and atropine (*bella donna*), which he was sure would deceive the medical experts for the reason that *bella donna* would tend to enlarge the pupils of the eyes, or at least of one of them, while the morphine would contract the other. Had Buchanan kept his own counsel after his wife died he might have escaped, but he boasted to his friends one evening of his superior knowledge of the use of drugs as contrasted with Harris' ignorance of them and, after

Buchanan's arrest, this admission was reported to the District Attorney.

The experienced counsel who defended Harris were not guilty of the error of allowing Harris to testify in his own behalf. Had they done so, I was so primed for his cross-examination that the outcome of the trial would never have been in doubt. But as Harris was convicted, Dr. Buchanan's lawyer tried the alternative experiment of calling him as their last witness. I shall never forget his pitiful attempts to parry the attack of the cross-examiner.

Harris had used a capsule as the vehicle for his poison; Buchanan thought he knew of a better way. When his wife died the only medicine found in her bedchamber was a harmless liquid prescription of bromide. The defence had had this concoction analyzed and offered proof of its harmless nature. It was shown that Buchanan was in the habit of giving his wife medicine taken from this very bottle and administered with a teaspoon. Where Harris used a capsule Buchanan used a spoon. Buchanan's wife had become suspicious of him and would not have taken a capsule from him in any event; but when given the medicine, a spoonful at a time, after seeing it poured from the bottle, she took it willingly.

During his cross-examination I put a poisonous dose of powdered morphine into a teaspoon and then made the prisoner stand up, face the jury and pour over the morphine the harmless liquid out of this very bottle. *It took up the morphine like a sponge*, so that its presence could not have

been apparent to any patient taking it. As Buchanan began to realize that he was enacting before the eyes of the jury the very method he had adopted to deceive his wife into accepting the poison from his hand, his agitation became so intense that he could hardly hold the teaspoon, and his fate was never much in doubt after he left the witness stand.

Certain forms of crime seem to come in waves. There had not been a prosecution for murder by the use of poison in this city for thirty-two years before the Harris case, and here were two such cases in quick succession. Directly on top of Dr. Buchanan's conviction still a third doctor ventured the use of poison as a means of taking human life. I refer to that fiend incarnate, Dr. Meyer. He was a physician of education and some standing in the community, who, in adversity, had induced a young patient to insure his life in his favor, and then to take a journey with him into the country. During their absence from the city Meyer began administering small but repeated doses of arsenic to his unsuspecting companion, who gradually wasted away to a skeleton, finally dying of dysentery and in the greatest agony.

It took three of us to convict Dr. Meyer. John S. McIntyre, now General Sessions Judge, DeLancey Nicoll and myself. Meyer was as crafty a murderer as ever stood at the Bar of Justice. He was very carefully defended in a trial lasting five long weeks. We three youngsters took turns at trying to break the force of the medical defence Meyer had cunningly constructed for himself. But, fortunately

for the cause of justice, Judge George Barrett was on the Bench and not only presided over the trial, but made one of his famous "Let no guilty man escape" charges to the jury. Every phrase was worded in strict accordance with the law, but the tone of voice and the significant gesture of head and hand greatly altered the meaning of the words from what they would convey when read in cold print in the "case on appeal" to a higher court. It was one of those charges that make even a young, ambitious Assistant District Attorney want to exclaim, at its close, "And may God have mercy on his soul"—those heartrending words which, through the centuries, always accompany the pronouncement of the sentence of death.

Those were memorable days for all the young lawyers who happened to be on the District Attorney's staff. We came face to face with every conceivable phase of human nature and we were taught lessons in the arts of advocacy, so much needed in practice in the civil courts later on, that we could have learned in no other quarter.

The days of Howe, Ecclestine, Brooke, Ingersoll seem to have passed into history. It is many years since I was in a criminal court and I know little of the present day customs, but I know from those who do practice there, that the opportunities of thirty years ago no longer exist. The famous trial lawyers for the defence who frequented the criminal courts in those days are all dead, many of them almost forgotten. Of the younger ones, those in the District Attorney's office, Vernon M. Davis and Bartow S. Weeks have

been elevated to the Supreme Court Bench. John F. McIntyre now sits as judge in the Court of General Sessions. But all of us who survived the terrible, fetid atmosphere of the crowded courtrooms in that little old Brown Stone Criminal Court House have succeeded beyond our fondest expectations.

I fear we are getting far afield from our subject—the efforts of lawyers to hoodwink juries. We have already become familiar with some of the subterfuges of our local lawyers, but let me assure you that similar methods have been employed in the English criminal courts from time immemorial.

Many years ago I heard a story of a trial at the Old Bailey where a lawyer showed a disposition to risk his own life in order to acquit his client. As Mr. Kingston in his book just published refers to the same incident and vouches for its accuracy, it is worth repeating here. This lawyer succeeded in acquitting his client, a woman, on trial for murder in a poison case, by taking a piece of the alleged poisoned cake with which she had supposedly killed her husband, and calmly eating it himself in the presence of the jury. Just then, by prearrangement, a messenger handed him a note acquainting him with the sudden illness of his mother. He communicated this fact to the judge, who excused him for a moment that he might send a note to his home. Upon his return to the courtroom he continued his address to the jury for another half hour, the jury expecting every moment to see him collapse under the effect of the poisoned cake.

As nothing happened to him, however, they concluded that the story of the poisoned cake must be fiction, and a verdict of not guilty followed. Long after the verdict the lawyer admitted to a friend that the message from his mother's bedside was a hoax, invented to afford him an opportunity to leave the courtroom and administer to himself an emetic so that he could get rid of the poison before returning to finish his speech to the jury!

For many years it was rumored around the old Criminal Court building that there were women in the vicinity who specialized in lending babies to those of their own sex who wished to make a mute appeal to the jury when on trial for some prison offense. These women always had on hand a good, fat, healthy baby or two which they were willing to hire out, if the occasion presented itself. Even good looking, sad-faced old mothers, hired for the occasion, have masqueraded by the side of unfortunate young women whose only chance of escape was an appeal to soft-hearted jurymen.

Charles Kingston gives an amusing account of a little dialogue between judge and counsel which occurred at the Old Bailey, when a man, whose grey hairs suggested that he had attained at least the half-century mark, was charged with a serious offense. The proof of his misconduct was overwhelming, and counsel therefore had to seek some means of enlisting the sympathy of the jury on behalf of his client. Consequently, his speech contained many pathetic references to the fact that the prisoner was a friendless orphan. Indeed, the word "orphan" was used by him in almost

every sentence, until the judge, suspecting that he was being trifled with, became irritable.

"Excuse me, Mr.—," he said impatiently, "but I fail to see what the fact of your client being an orphan has to do with the case. He has obviously arrived at that time of life when the loss of one's parents is natural, and only to be expected. Why, I cannot be older than the accused, and I am an orphan."

"Quite so, my Lord," said the counsellor in his suavest manner. "I trust that should your Lordship ever have the misfortune to be brought before a jury of your fellow countrymen, that fact will be taken into consideration." But his Lordship had the last word and the "orphan" in the dock received seven years' penal servitude.

Trials in the civil courts, where property rights are in dispute rather than personal liberty, are naturally devoid of many of the more tragic scenes met with in the criminal branch of the law. Most lawyers who start practicing in the criminal courts regard them only as stepping stones to higher things, but the same appeals to prejudice and passion, perhaps in modified form, always find their way into any court where juries have the deciding voice.

In the civil courts what I have perhaps inaptly styled the "tricks" of the lawyers are far more subtle, but no less persuasive. How often have I seen adroit counsel succeed in completely diverting the attention of an entire panel of jurymen by starting a dispute upon some puny side issue, which in reality had nothing whatsoever to do with the

merits of the case. And yet it may be so cleverly handled that it dwarfs every other question in the case.

I could name lawyers at our Bar who almost invariably adopt this method in every desperate case they try, and succeed with it to a most exasperating, if not alarming, extent. The side issue is often some utterly irrelevant transaction, perhaps of long ago, savoring, however, of fraud, or greed, or malice, which gives it a more human interest and diverts the juror's mind until he is gradually persuaded that it really is a deciding factor in the whole proceeding. It seems almost incredible that this should be the fact, but I have seen it so often that I hail the opportunity to point out to jurymen the fallacy as well as the serious injustice of being led astray by any such tactics on the part of the advocate. Get all the divertisement you can out of these side plays, but I beg you to avoid the secret contempt of the very lawyers who have been trying to deceive you, by discarding them bodily when passing judgment on the real issues before you.

The following story would seem to be very much over-colored, were it not vouched for as having actually occurred in one of the courts in the State of Iowa in a trial conducted before Mr. Justice Faville of the Iowa Supreme Court.

A railroad company was being sued for personal injury. The experts for the plaintiff contended that as a result of the injury the plaintiff was a confirmed and hopeless victim of neurasthenia (nervous prostration), and their evidence

tended to show that one so afflicted had deteriorated mentally and would rapidly decline. A rather pitiful picture was painted. On cross-examination the attorney for the railroad developed from the expert doctor that the main ground for his opinion that the plaintiff was suffering with neurasthenia was the fact that he appeared to suffer no pain when pricked with a pin on the top of his head, and that this test was quite conclusive proof of neurasthenia.

The lawyer for the defendant was an ex-judge, a man somewhat advanced in years and exceedingly resourceful. Incidentally, he was as bereft of hair as the oft cited billiard ball. When it came time to argue the case to the jury he proceeded to expound the facts with clearness and vigor for a considerable length of time and finally approached the subject of neurasthenia.

After paying his respects to the learned experts for the plaintiff he took up the subject of the final test in the examination the experts had made of the plaintiff. He assured the jury of his great personal regret, and in fact his surprise and astonishment, at the discovery the examination of these learned men had disclosed, namely, that one who did not experience pain by the prick of a pin on the top of the head was a neurasthenic and rapidly progressing to complete mental decline. He assured the jury that he felt he was a man of reasonable physical vigor and had always supposed he was still possessed of his normal mental faculties, but to his great distress he now discovered he himself was a hopeless neurasthenic and would demonstrate to the jury that

he had no business trying lawsuits, but should be preparing himself rapidly to meet his Maker.

Thereupon he turned back the lapel of his coat and extracted a good sized needle which he promptly stuck in the top of his head. He kept this up until he had some ten or twelve needles sticking in the top of his bald head and looked like an animated pin cushion. He finished his argument and, needless to say, a verdict was returned in favor of the defendant. He confided to the judge in later years that the last needle got outside the area of the cocaine which his physician had hypodermically injected into his scalp just before he began his argument, and almost unmasked the hoax. As Judge Faville said to me, "If I could picture to you the scene of this venerable old war horse prancing up and down before that jury with his bald head bristling full of needles and haranguing them at the top of his voice, I should be very happy indeed."

There is another less skillful method of beclouding the issue in a case, and that is by constant and repeated objections to questions, even to answers, and calling upon the judge for repeated rulings on trivial technicalities of evidence. By this method it is hoped to so disrupt the orderly sequence of the story the witness is attempting to tell, and to so distract the mind of the juror from its telling, as to lessen, if not utterly destroy its effect. Whenever a lawyer adopts this method you may assure yourselves that he has something to conceal; he does not intend that you shall know the truth and decide for yourselves. He is not playing fair with you.

Other lawyers, especially in a weak case or perhaps only with a doubtful witness, resort to the pernicious habit of putting leading questions, that is, questions which at once suggest the desired answer. The judge will undoubtedly admonish the lawyer, but the harm has been done. The question is then repeated in its proper form, but the desired answer comes from the witness as the lawyer had originally suggested. A moment's reflection will satisfy any juror that by this trick the lawyer intended that the witness should be given credit for the favorable answer which the lawyer had put into his mouth. But if he takes my advice he will discard such answers altogether and treat the matter as if the question had never been asked or answered.

Still another class of lawyers, of somewhat limited experience, try to influence the judgment of a jury by treating every witness who is opposed to their side of the case as if he were committing wilful perjury. They shout at him, browbeat him, often incorrectly repeat the answer of the witness, especially if it is thought the jury did not hear it plainly, and in every way possible try to confuse the wits of the witness, intimidate him and put him in a false light before the jury. Such methods should elicit nothing but sympathy for the witness, but unfortunately they have force with some jurymen, else even the inferior lawyers who still use them would soon abandon them altogether. Whenever I come in contact with this practice I always suspect the lawyer of being a product of former days when the require-

ments for admission to the Bar were far different from those of the present day.

One of these half-baked, blustering lawyers went by the name of "Counsellor Nolan." He was a very tall, raw-boned Irishman, but a man of considerable native wit. He always wore a dilapidated beaver hat, which he used to deposit on the counsel table and then throw his law papers into it. On one occasion when trying a negligence case before Judge Abraham Lawrence, in the Supreme Court, after the plaintiff's testimony was all in, counsel for the defendant made the usual motion to dismiss the complaint, stating his reasons. Judge Lawrence, addressing Mr. Nolan, asked him what he had to say in answer to the motion, whereupon the counsellor addressed the court as follows:

"If your Honor please, I've tried four cases this wake, and aich one of thim was dismissed by the coort. Therefore I hope your Honor will allow this case to go to the jury." *

In England, in the days of the Georges, legal education was largely a matter of eating so many dinners in the Inns of Court during an appointed time, and also of having so many pounds sterling in one's pocket. Later on, when it was concluded that "legal education by dinner" was no longer satisfactory, a middle course was adopted which required a student to produce a certificate of having read for a certain length of time in some barrister's chambers. There were always plenty of benevolent barristers who, if they were paid the necessary fees for the privilege of reading in their

* "The Barrister."

chambers, allowed the students to make their choice whether to read in them or not. An amusing story is told of a student who, to the knowledge of all his friends, had never read anything pertaining to the law of real property, but nevertheless contrived to pass his examination. Someone pressed the examiner for an explanation, and this was:

"My rule," said the examiner, "is to pass any man whose examination I can mark 50%. Well, I asked him two questions. The first was 'What is the rule in Shelley's Case?' He answered that it had something to do with poetry. Of course, that was wrong. Then I asked him 'What is a contingent remainder?' He answered that he was sure he didn't know. Well, that was right. So I passed him. He was 50% right!"

Anent these not too highly educated lawyers essaying the arts of oratory, a story is vouched for to me by the western judge who presided at the trial, else it would seem incredible.

"Last year," relates the judge, "in an action for absolute divorce in which the wife was the defendant, tried before me and a jury, the learned counsel for the defendant wound up his summation thus:

"Remember, gentlemen of the jury, that old proverb, What God has joined asunder let no man tear apart."

Once, when Judge Purple of Peoria was on a trip to the east, he met a gentleman from Boston who, on learning that the judge was from Illinois, made particular inquiry as to the success of a young law student, who had migrated thither some five years before. "He's doing well," replied the judge.

"He is, is he? Well, I am glad to hear it. You think he has a good practice, do you?" "I don't know anything about his business," said the judge. "Well," said the Bostonian, "you seem to think he is doing well and yet you know nothing about his practice or business. What do you mean?" "I mean just this," said the judge; "that any man who practices law in Illinois five years and keeps out of the penitentiary is doing well whether he has a practice or not."

In one of our local courts, not long ago, a young lawyer, summing up for his client, employed a method of violently clapping his hands throughout his argument while standing close to the jury box, and dangerously near some of the faces of the jurors in the front row, to whom it became most annoying. Some of the jury showed their disapproval by scowling at him. The presiding justice, slow to censure idiosyncrasies of counsel by interruption, remained silent. Finally, however, counsel clapped his hands so near the face of the foreman that the latter, in fun, dodged perceptibly sideways as if to avoid a severe blow. Whereupon, the judge quietly remarked, "Counsellor, I am of the opinion that you will better conserve the interests of your client in the eyes of the jury if, during the balance of your summation, you will refrain from *applauding your own efforts*." The lawyer finished his speech with his hands behind his back, and the jury began to pay some attention to what he said.

Still another class of lawyers whom you will meet—for there are many varying types among us—have a habit of

forgetting the names of witnesses and have to have them written down for constant reference. There is a story about one of these lawyers who was constantly mixing up the name of the plaintiff with that of the defendant. In his address to the jury he would speak of Mr. Smith the plaintiff, when he meant to refer to Mr. Jones the defendant, and the other way about. Finally, in the heat of argument, he brought in the name of Robinson, whereupon the judge stopped him with the remark that the jury had doubtless become accustomed to the name of Smith when it should be Jones and Jones when it should be Smith, but now that counsel had seen fit to introduce the name of Robinson, both the court and jury must become a little perplexed to know which he referred to by Robinson, whether it was Smith or Jones!

Although it is something of a digression, every trial lawyer who has ever had a very extended practice realizes that, in order to be able to absorb quickly the facts in each new case presented to him, he must acquire the habit of forgetting just as quickly. Lawyers who have attained a large practice develop a power of acquiring and forgetting knowledge of all sorts with a rapidity that amazes the clerks in their offices. When Sir Charles Russell, insisting to his junior that he knew nothing about the case they were discussing, was reminded that he had already argued it three times on appeal, he replied, "If I were to remember all the facts in all the cases I have been in, what sort of a thing would my head be now, do you think?"

Some lawyers weary their juries with their long-drawn out speeches, replete with constant reiterations. They might well heed the advice once given by an elderly clergyman to a class of theological students about to graduate: "Never make long prayers, but try always to remember that the Lord surely must know something."

Judge Wightman of the Court of Queen's Bench was famous for his humor. An excellent barrister, not however famed for his brevity, had been for a considerable time elaborating his arguments before a Kentish jury. Mr. Justice Wightman, interposing, said: "Mr.—, you have stated that before," and then, pausing for a moment, added, "But you may have forgotten it; it was a very long time ago."

William M. Evarts was noted for his use of long sentences in addressing a court or a jury. This peculiarity of his gave rise to much bantering among fellow lawyers at Mr. Evarts' expense. When Judge Van Brunt was presiding over the old General Term of the Supreme Court, he established a rule that no argument on a mere motion before his court should exceed fifteen minutes. Shortly after this rule went into effect, the judge was presiding at a dinner where Mr. Evarts was to be the principal speaker. In introducing him the Presiding Justice referred to the new rule of his court and said that, during the recent argument of a motion by Mr. Evarts, he had been obliged to interrupt him and remind him that his fifteen minutes had already expired *before he was half through his first sentence*. When Mr. Evarts rose to re-

spond, he admitted vaguely remembering the argument before the General Term and said he was not prepared to deny the incident Judge Van Brunt had referred to. He wanted to add, however, that he had always supposed it was only the criminal classes who objected to long sentences!

In the Southern District of Alabama, I have heard, they have invented an entirely new and original method of destroying one's adversary's speech to the jury. An elderly lawyer at the Mobile Bar, by the name of J. J. Parker, was not only resourceful, but enjoyed a joke. Once, while he was defending a case in the criminal court in Mobile and during the argument of the prosecuting attorney, who was a rather prosy man, Parker moved his chair around so as to be under the judge's desk and behind the speaker, so that neither could see him. But he was in full sight of the jury. After a short time he began to nod his head as though very drowsy, and to tilt his chair back until it looked as if he would fall backwards. He would then make a little start and right his chair, and then pretend to go to sleep again, much to the amusement of the jury. The prosecutor realized that something was going on to distract the attention of the jury, because their faces were covered with broad grins in spite of his solemn argument. Finally Parker lost his balance and fell over backwards, making a good deal of commotion. The bystanders, who had been enjoying the scene as much as the jurors, broke into uncontrollable laughter which was joined in by the jury, and the prosecutor's argument was completely destroyed.

These same wordy lawyers, when they sum up their cases to the jury, are prone to mistake noise for logic. Their speeches can be heard all over the court house, and yet they fail to reach the minds or convictions of the jurors directly in front of them.

Robert Stewart Sutcliffe has lately published a clever little book called "Impressions of an Average Jurymen," in which he has embodied his experiences after serving on juries for sixteen years. The book comprises less than one hundred pages, but it is full of common sense suggestions. Speaking of the blustering style of some lawyers, he says:

"What salesman would think of yelling at a merchant if he had something to sell him, unless perhaps the man was deaf? Imagine trying to nail down an order by walking up and down in front of a prospect and shouting at the top of your lungs. The buyer would either think you were crazy or that you thought he was. Some of the lawyers act as if the men in the jury box had been brought up in convents or had been inmates of the Home for the Feeble Minded. The male crane and some other birds do a weird dance when they want to impress the ladies of their affections, and go through some other strange antics, and a juror is led at times to believe that some of the lawyers have read about it and are trying the same scheme. They amble up and down, wave their arms, tear their hair or mop their brows and call upon high Heaven to witness that they have the only just cause. And the jurymen laugh up their sleeves and say to themselves, 'What rot!'"

In one of Rufus Choate's cases, when his opponent was shouting at the jury in a very loud tone, Choate rose and referred jokingly to the *stentorian* powers of his adversary. The lawyer indignantly asserted that nothing in his mode of address would justify any such stricture. But as he proceeded with his argument, his voice gradually rose again to a very high key and rang throughout the court house. Thereupon, Choate half rose in his chair and said in the mildest, politest tone, "Just one word, may it please the court, only one word, if my brother will permit me. Now I see my mistake, and I beg leave to retract what I said."

By the most experienced lawyers I think it is admitted that in not more than one action in a hundred is mere eloquence the thing to be desired; in a few more, it is well enough; but in the vast majority of cases it is only in the way. Theophilus Parsons, in his memoirs of his father, who was Chief Justice of the Supreme Court of Massachusetts, speaking of his father's manner with the jury, tells how he won his juries without either noise or oratory:

"When his turn came to argue the case he put one foot on his chair, and, with an elbow on his knee, leaned over, and began to talk about the case as a man might talk to his neighbor by his fireside. Pretty soon he was winding that jury round his fingers. He made no show; he treated the case as if it were a simple affair, of which the conclusion was obvious and inevitable; and he did not talk long. He got a verdict at once; and after the jury were dismissed, one of them, whom I happened to know, came to me and said,

‘Who is this Mr. Parsons? He is not much of a lawyer, and don’t talk or look as if he would ever be one; but he seems to be a real good sort of a man.’”

When Chief Justice Parsons was appointed to the Bench, some one, complimenting him on his success as an advocate, uttered the absurdity, “I have heard it said, sir, that you never lost a case. Can that be literally true?” “It is, sir,” said he; “I assure you that it is literally and precisely true. I never lost a case in my life; and the reason I suppose, is, I never had one. My clients have lost a great many; but their cases were not mine.”

Let us pause here to contrast these crude methods of the comparatively illiterate, uneducated attorney with the charm and exquisite humor with which our own Joseph Choate used to fascinate his juries and win his verdicts from them. Whenever a proper opportunity presented itself to make use of these accomplishments, Mr. Choate was well nigh invincible as an antagonist.

Lawyers who knew Mr. Choate long before I did claim that he always gave every case careful study and investigation, although he had a way of concealing this fact from a jury by the seeming spontaneity with which he developed the facts from the witnesses and by his charming and delicate play of humor in presenting them to the jury. His style was simple and his summings up likewise. The subject under discussion was made to appear so plain and one-sided that it was almost as if he were explaining something that really required no explanation. Choate’s manner before the courts

was always independent; indeed, there were times when he would remind judges that they were not above criticism.

Theron G. Strong tells of an incident when Choate indulged in a comment before a judge who, becoming incensed, said from the Bench, "If you say that again I shall commit you for contempt." To this Mr. Choate replied, "I have said it once and it is quite unnecessary to say it again." And upon another occasion, a judge allowed his attention to be diverted from an argument Mr. Choate was making, whereupon Mr. Choate stopped. The judge looked up in surprise. Then Mr. Choate, bowing gracefully to the court said, "Your Honor, I have just forty minutes in which to make my final argument. I shall need not only every second of my time to do it, but I shall also need your undivided attention."

We are fortunate in having several biographies of Mr. Choate, but by far the most accurate and entertaining is Theron G. Strong's "Joseph H. Choate," published by Dodd, Mead & Co. I have Mr. Strong's permission to make such use of his book as I think germane to my subject; and, as much of Mr. Strong's material was culled from Mr. Choate's own scrap books, it has the stamp of authenticity and makes his anecdotes doubly entertaining and instructive.

Mr. Strong gives an account of Mr. Choate's remarks on an occasion when Recorder Smyth undertook to punish John W. Goff, later himself Recorder and also a judge of the Supreme Court, for an alleged contempt of court. Goff

was defending a man by the name of Gardiner, an agent of the Society for the Prevention of Crime, who was being prosecuted for taking graft money from the keepers of disorderly houses against whom he had been assigned to gather evidence for criminal prosecution. Mr. Goff's zeal for his client in the excitement of the trial gave rise to several rather sharp encounters between himself and the Recorder, who waited until the jury had retired and then notified Mr. Goff to appear before him the following day to show cause why he should not be punished for contempt of court. On this occasion, Mr. Strong says, Mr. Choate volunteered his services in the interest of the profession, to uphold what he regarded as the proper discharge of an attorney's duties to his clients.

Mr. Choate took the position that Mr. Goff had not committed any contempt because his conduct upon the particular occasion referred to was not in fact what Recorder Smyth had declared it to be. "But," interrupted the Recorder, "I saw him do it." "Then," replied Mr. Choate quite calmly, "it becomes a question, of course, between your Honor's personal observation and the observation of a crowd of witnesses who testify to the contrary. Was your Honor ever conscious," he asked, "of being absolutely convinced from the very outset of the trial that a certain person was guilty? If not, then you are more than human. Was your Honor ever conscious as the trial proceeded that it was impossible to conceal your opinion? If not, then you are more than human. Well, that has hap-

pened, in many courts, time and again; and when it does happen it arouses the aggressive resistance of every advocate who understands his duty, and he would be false to his trust if it did not arouse him."

Mr. Strong concludes: "This lordly and independent stand in upholding professional independence induced the Recorder to hesitate to proceed to extreme measures, and he found a way out of the difficulty by reading the assemblage of lawyers and others present a homily on the duty of the profession with respect to their conduct in the presence of the court, and terminated the proceedings by taking no further action."

As I conducted the prosecution and was a witness to everything that occurred at the trial, whereas Mr. Strong had it only on hearsay, I may say there was always considerable doubt in my mind how far the Recorder was really influenced by the presentation of the case by Mr. Choate. I gathered that he was influenced primarily by the realization that Mr. Goff had assumed his attitude toward the Court more at the insistence and behest of his clients, rather than from any intentional disrespect to the Bench; for the officers of the Society for the Prevention of Crime, including Dr. Parkhurst, were most apprehensive as to the effect of Gardiner's possible conviction. Certain it is that after Justice Goff himself became Recorder, he fairly outdid Recorder Smyth in his insistence that due respect be shown the Bench and, under similar circumstances, I doubt if Mr. Choate's argument would have made

any impression at all on Recorder Smyth's worthy successor. But the incident is cited because it illustrates Mr. Choate's resourcefulness in dealing with any situation that confronted him.

As a method of eliciting the interest of a jury at the very outset of a case, I ask you—Mr. Juror— could anything be more appealing than the following sentences of Mr. Choate's opening address in the case of Stuart against Huntington? This was a litigation, as Choate himself described it, for the purpose of determining the more or less important question as to which party was the rightful owner of \$6,000,000. He told the jury there was no opportunity for an appeal to their sympathy. He reminded them it was not a case of rich against poor, capital against labor, power against weakness. He described his own client as a prudent but substantial business man, and referred to the defendant as "a man who owned many houses, many railroads, many banks, many newspapers, many judges, many legislatures," and then went on to say:

"I doubt, gentlemen, whether any man ever had to contend alone against so powerful a combination. In the first place, there is the defendant himself, one of the three great railway monarchs of the world, all powerful throughout the length and breadth of the land, who has called here to aid him in this fight the greatest powers of the Bar, the most astute, the most crafty—in the best sense of the word—the most skillful of our profession," and with a graceful wave of the hand toward Mr. Conklin, "the very Demosthenes

of our time. Yet I don't feel entirely alone or entirely unarmed. *I have the evidence in this case with me*, and I think I can put that little weapon in my sling and, aiming straight at his forehead, the greatest Goliath of this continent is bound to 'bite the dust.'"

Sir James Scarlett, formerly one of England's most successful trial lawyers, is described as being "the very incarnation of contentedness and good nature." A spectator notes his "perpetual cheerfulness," his "laughing and seductive eyes," his "How-do-you-do style," as he used to stand before the jury, "fold up the sides of his gown on his hands, and then, placing his arms on his breast, smile in their faces from the beginning to the end of his address, talking all the while to them as if he were engaged on a mere matter of friendly conversation." *

It was said of Thomas Erskine that his words were like "arrows winged with the feathers of the very bird of paradise," and of Rufus Choate, that his delivery was as "a musical flow of rhythm and cadence, more like a long, rising, and swelling song, than talk or an argument." Whereas, Daniel Webster's style was described as "reason impelled by passion, sustained by legal learning, and adorned by fancy."

Nobody, be he juror, lawyer or spectator, who had the good fortune to attend court upon the occasion when the celebrated architect, Richard M. Hunt, was suing Mrs. Paran Stevens, will ever forget the way Mr. Choate, who appeared for Hunt, carried everything before him by his

* "Seven Lamps of Advocacy," Parry.

charm, wit and sarcasm. Mr. Hunt was suing for his fees earned during the construction of the Victoria Hotel at 26th Street. This was the first large apartment hotel built in the city. Because of Mrs. Stevens' desire for economy, she had insisted upon the retention of an old party wall in the western section of the new building. The work was hardly completed before the walls began to open in wide cracks, from cellar to roof, owing to the inadequate support of this party wall, with the result that Mrs. Stevens refused to pay her architect's bill. John E. Parsons represented her side of the case.

Mr. Choate, being aware of Mrs. Stevens' habit of neglecting to pay her bills as well as her known addiction to profanity—albeit she was, at the time, one of the leaders of New York society and one of its wealthiest members,—made constant use of all his powers of sarcasm and repartee to hold her up to ridicule before the jury. Mrs. Stevens was of humble origin and her husband had at one time been proprietor of the Fifth Avenue Hotel. It was only in later years that she acquired great wealth and a semblance of social prominence. In his summing up to the jury Mr. Choate made constant allusions to Mrs. Stevens' rise from humble conditions. "At last," said he, "the arm of royalty was bent to receive her gloved hand, and how, gentlemen of the jury, did she reach this imposing eminence? (An impressive pause.) Upon a mountain of unpaid bills."

On one occasion when a witticism of Mr. Choate's called forth shouts of laughter from the spectators, Mrs. Stevens

said something under her breath. Mr. Choate turned to her and exclaimed, loud enough for the jury to hear, "Oh, no, madam, I am not such a d— scoundrel as all that." Mrs. Stevens rose in great wrath to address the court, but was subdued by Mr. Parsons, who denied on behalf of his client the use of any such language as Mr. Choate's remark would imply.

In closing his irresistible speech to the jury Mr. Choate made use of the following adaptation of a familiar nursery rhyme to the circumstances of the case before them:

"For the last week, gentlemen of the jury, we have been engaged here in a bitter contest. It has tried all of us. Coming by my children's nursery door this morning I heard them trying to teach the baby the story of 'The House that Jack Built.' I was almost inclined to think that they had been in court listening to this case, for, gentlemen, we are considering 'The House that Jack Built.' My client is the unfortunate 'Jack' and you, madam (looking and bowing gracefully to Mrs. Stevens), may be called 'the maiden all forlorn that milked the cow with the crumpled horn'—which we can easily imagine is the Stevens estate—while the opposing counsel who knows he has a bad case and is anxious about his fee is 'the dog that worried the cat'—worrying the only witness who could tell you how 'the cat caught the rat'—the dishonest workmen—'that ate the malt' and pocketed the money—'that lived in the house' that Hunt built."

Mr. Strong, referring to this case, says, "Mrs. Stevens

poured out the vials of her wrath on Mr. Choate and started upon what she called a 'crusade' against him, and secured the publication in one or two society journals of caustic criticisms on his conduct. 'She was,' Mr. Choate told me, 'very indignant at the time. But,' he added, 'we became good friends afterwards—so good that she used to invite me to her house.'"

When all is said and done, love of oratory is still strong in the human heart. Like a delicious odor, its charm is subtle and baffles all our efforts to explain it. Whenever there is sufficient occasion for it, the jury expect and should be accorded the best efforts of the advocate's oratorical abilities.

To really appreciate a great oration one must have heard it not only with its accompaniments but with a sense of the temper of the people to whom it was addressed. Some great orator has said that the key to a great speech is always to be found "in the assembly." The printed report of a speech but meagrely represents the words themselves as they fell warm from the lips, and can at best little more than suggest the real impression made at the time of delivery. Something can be accomplished by picturing to ourselves the crowded courtroom and the inspiration of the tense audience; the hush, the expectancy, the eager faces, the silence and dignity of the courtroom. Thus we may realize faintly the spirit of the occasion.

A country parson who had just electrified his parishioners by a stirring discourse, preached during a thunderstorm,

was asked for permission to have it printed. He quite rightly replied: "Yes, by all means, *if you will print the thunderstorm along with it.*"

Professor Ticknor, in one of his letters, says of the intense emotion with which he listened to Webster's Plymouth address:

"Three or four times I thought my temples would burst with the gush of blood, for after all you must know that I am aware it is no connected and compact whole, but a collection of wonderful fragments of burning eloquence, to which his manner gave tenfold force. When I came out I was almost afraid to come near to him. It seemed to me that he was like the mount that might not be touched, and that burned with fire."

When Patrick Henry summed up the celebrated tobacco case against the parsons in 1758, it is said that the people were to be seen in every part of the court house, on the benches, in the aisles, and in the windows, hushed in death-like stillness, and bending eagerly forward to catch the magic tones of the speaker. The jury was so carried away by his eloquence as to lose sight entirely of the express legislative enactments which clearly gave the plaintiffs the right to a verdict. And even the court lost the equipoise of its judgment, and refused a new trial. The people, who could scarcely keep their hands off their champion after he had closed his harangue, no sooner saw that he was victorious than they seized him at the bar, and in spite of his own efforts, and the continued cry of "Order!" from the sheriff

and the court, bore him on their shoulders out of the court house, and carried him about the yard in frenzied triumph.*

Col. Ingersoll's closing argument in the Star Route case, I quote from "Donovan on Trial Practice" (1883):

"You have nothing to do with the supposed desire of any man, or the supposed desire of any department (turning to the Attorney General), or the supposed desire of any government, supposed desire of any president, or supposed desire of the public. You have nothing to do with these things; you have to do only with the evidence. Here all power is powerless except your own. When asked to please the public, you should think of the lives you are asked to wreck, of the homes your verdict would darken, of the hearts it would desolate, of the cheeks it would wet with tears, of the characters it would destroy, of the wife it would worse than widow, and of the children it would worse than orphan. When asked to please the public think of those consequences. When asked to act from fear, hatred, malice or cowardice, think of those consequences. Whoever does right clothes himself in a suit of armor which the arrows of prejudice cannot penetrate, but whoever does wrong is responsible for all the consequences to the last sigh, to the last tear. You are told by Mr. Merrick that you should have no sympathy, that you should be like icicles, that you should be Godlike. That is not my doctrine; the higher you get in the scale of being, the grander, the nobler, the tenderer you will become. Kindness is always an evidence of great-

* Donovan's "Modern Jury Trials."

ness. Malice is the property of a small soul, and whoever allows the feeling of brotherhood to die in his heart becomes a wild beast.

‘Not a king’s crown nor the deputed sword,
The marshal’s truncheon nor the judge’s robe,
Became them with one-half so good a grace
As mercy does.’

“And yet the only mercy we ask is the mercy of an honest verdict. I appeal to you for my client, Stephen W. Dorsey, because the evidence shows that he is a man with an intellectual horizon and a mental sky—a man of genius, generous and honest. Yet this prosecution, this government, these attorneys, representing the majesty of the republic, representing the only real republic that ever existed, have asked you not only to violate the law of the land, but also the law of nature. They maligned nature, they have laughed at mercy, they have trampled on the holiest human ties, and even made light because a wife in this trial has sat by her husband’s side.

“There is a painting in the Louvre, a painting of desolation, of despair and love. It represents the ‘Night of Crucifixion.’ The world is wrapped in shadow, the stars are dead, and yet in the darkness is seen a kneeling form. It is Mary Magdalen with loving lips and hands pressed against the bleeding feet of Christ. The skies were never dark enough nor starless enough, the storm never fierce enough nor wild enough, the quick bolts of heaven were never

livid enough, and the arrows of slander never flew thick enough to drive a noble woman from her husband's side, and so it is in all of human speech the holiest word, 'woman.'"

This effective weapon of the advocate of olden times has been materially weakened in its effect on jurors by the general diffusion of information through the public press, the better education of the middle classes and the gradual development of man's intelligence. It is now evidence rather than eloquence that prevails with our modern juries, and this is daily becoming more evident. In this connection the language of Dr. Hall, who once wrote on the danger of using too flowery language in a summing up, is illuminating:

"If I were upon trial for my life, and my advocate should amuse the jury with tropes and figures, pouring his argument beneath the profusion of metaphors, I would say to him: Tut, man; you care more for your vanity than for my hanging. Put yourself in my place; speak in view of the gallows and you will tell your story plainly and earnestly. I have no objections to a lady binding a sword with ribbons and studding it with roses when she presents it to her lover, but in the day of battle he will tear away the ornaments and present the naked edge to the enemy."



LORD GORDON HEWART

The present Lord Chief Justice of England

CHAPTER VI

JUDGES

No juror can finish his first day in court without realizing what a hopeless jungle any trial would become if the witnesses and lawyers were left to themselves to fight it out without a judge on the Bench to take charge of the affair. In former chapters we have seen the important rôles played by both witnesses and lawyers, but in the last analysis the real controlling factor in almost every trial is his Honor, the Judge, who presides over the proceedings.

After the witnesses and the lawyers have done all in their power to mess up the controversy, it is the province of the judge to straighten the whole thing out in what is called, in this country, his "charge" to the jury. The witnesses have told their story, the lawyers have made their speeches and the minds of the jury have been swayed back and forth, first to one side and then to the other; and they soon learn to look to the judge to clear things up for them.

A painstaking judge begins by pointing out to the jury, in the simplest language he can employ, the rules of law that are applicable to the particular facts they are to decide. He then takes up *seriatim* the witnesses who have testified, and recalls to the minds of the jurors their names, occupations and relationship to the parties in interest, together

with a brief but intelligent summary of the facts and circumstances to which they have taken oath.

It has always been my ambition to contrive some means that would enable the jurors to keep a record of the witnesses and their statements, with which to refresh their recollections after retiring to the jury room to discuss their verdict. I have been tempted to hand to the foreman a note book with the request to write down the name and occupation of each witness as he takes the witness chair, together with the salient points in his testimony. Such a procedure would be distinctly against the present practice and would be promptly ruled out. I have, however, been allowed to bring into court a large blackboard on which I have chalked the outlines of the locality of some particular happening, and then have written the name of each witness on the spot pointed out as the one he occupied, when observing the facts he testified to. It proved an excellent idea, and I am convinced it was a great ocular assistance to the jury in following the testimony, but I doubt very much if the present-day judge would tolerate any such invasion of his own prerogatives.

Nowadays the judge is supposed to take notes of the testimony of each witness, although some judges rely upon memory rather than on written notes, and when charging the jury they use their own notes to refresh the minds of the jury. No one wishes to criticise this method. My only comment is that it should be supplemented by some additional system which would aid the jury to keep in mind testimony given perhaps by ten, twenty, forty, sometimes as many as eighty

or a hundred different witnesses who have appeared before them.

The late Mr. Justice Miles Beach, of the Supreme Court, in my judgment surpassed any other judge on the Bench, in his time, in the simplicity and thoroughness with which he marshalled the facts of a case during his charge to the jury. It is true I never practised before him until he had had many years' experience as a judge, but one can never forget the quiet dignity with which he presided over the courtroom. He was not averse to a little fun and diversion among the lawyers; his gavel never pounded down a witty saying by lawyer or witness, and yet the trial lawyers all respected him and no one ever attempted any angry bantering between counsel, such as has lowered the dignity of the profession in several recent trials. Judge Beach seldom entered into any argument with counsel on questions of evidence; a slight shake or nod of the head indicated his ruling. And when it came to his charge to the jury, neither side could complain that he had omitted a single fact or circumstance that had any important bearing upon either side of the controversy.

In England the Lord Chancellors used to appoint the judges; and when Chancellor Lyndhurst was once asked how he chose his judges, he replied, "When I want a judge I look around me for a gentleman, and if he happens to know a little law, so much the better." When the County Democracy nominated Judge Beach for election to the Bench, they certainly picked out a gentleman, and while he was not

perhaps a profound lawyer, yet he had the priceless qualification for the Bench of being able to assist his juries by his remarkable presentation of the testimony which should guide them to a just verdict.

While the little pleasantry attributed to Lord Lyndhurst when he was Lord Chancellor, in connection with the selection of judges, may have been true at the time, certain it is that in modern times the English Judges of high rank owe their promotion, in most instances, to their prominence at the Bar as barristers, and to the distinguished ability with which they conducted their cases. In England the leaders of the Bar often started their professional careers in the Criminal Courts, and because of the masterly handling, either for the Crown or for the prisoner, of some celebrated murder trial were launched upon their successful careers as barristers, and soon became marked for elevation to the Bench.

In this country, as in England, our successful trial lawyers often owe their advancement to the training they received in criminal trials, but when they have once "arrived," so to speak, they usually confine their practice to the civil side of the law. Not so in England, however, where, for all time, the leading K. C.'s and most celebrated barristers seem always to have been willing to enhance their practice and reputations by frequent appearances in celebrated criminal cases. Even after they had become Lord Chief Justices they still made every effort to preside at such trials.

For example, John Inglis, afterwards Lord President

Inglis, the greatest of Scottish Judges, "embarked in the legal profession without family influence or hereditary wealth," to use his own words. He became the first criminal lawyer of his day, and was overwhelmed with the most remunerative business; and yet it was probably his successful defence of Madeline Smith which, more than anything else, made him Lord Justice-Clerk of Scotland the following year. Mr. Charles Kingston, in his fascinating book, "Famous Judges and Famous Trials," gives a delightful account of this romantic murder trial. He says that Inglis' closing speech to the jury has been read by every young barrister in England at least once in his lifetime and speaks of it as a "speech which will live forever."

Mr. Kingston's account of the trial represents Madeline Smith as a pretty Scotch girl, of good education and social position, and the man she was supposed to have poisoned as an adventurer of French origin. One of the features of the trial was the reading of her letters to her lover, "letters which for passion and self-revelation are without parallel." She was a voluminous letter writer, but when her tone changed and her letters became cool and full of trifling prevarications, her lover began to reproach her, and it was probably these covert threats and angry criticisms that precipitated the tragedy. In her letters she always addressed him as her "beloved husband." They were full of her plans for their possible wedding. In one letter she wrote of his visit the evening before: "Beloved, if we did wrong last night it was in the

excitement of our love. I did truly love you with my soul. If only we could have remained, never more to part."

There was an insurmountable objection to the marriage in the eyes of Madeline's father the moment the subject was broached to him. Their previous meetings had been clandestine, for fear of this opposition. When the father at last flatly refused to allow the marriage, the girl decided not to forego her comforts and position for an impecunious lover. They quarrelled for nearly a year, when finally her lover stooped to the plan of showing her letters to her father upon the theory that if the nature and extent of their intimacy were once known, no further objection would be made to the marriage, as it would then be necessary to save the family honor. Fearing that he would carry out the threat, the lady requested her lover to call outside her bedroom window late one evening, and it was the claim of the prosecution that when she got him there she gave him poisoned tea to drink. A few hours later he was dead.

Mr. Kingston says that the prosecution was unpopular, for, despite her sordid story, Madeline Smith was a popular heroine and everyone's sympathies were with her. Nevertheless, he says, it was sheer personal merit on the part of her distinguished lawyer that saved her life—for "never before had an advocate done so much to earn fame." The verdict of the jury was thirteen to two for "not proven."

For nine years thereafter Inglis was Lord Justice-Clerk and presided as judge over many famous criminal trials and later was installed as Lord Justice-General of Scotland and

Lord President of the Court of Sessions, which post he held for twenty-four years. "He was one of the most popular men of his time. Everybody felt safe in his hands. His stately presence enhanced the dignity of the law without terrifying the wretches in the dock."

Again it was a murder trial that brought John Duke Coleridge prominently before the profession, and it was his eloquent and moving speech on behalf of his client which from that moment made him recognized as one of the great orators of his profession. He later, as everyone knows, became Lord Chief Justice of England. Kingston says of him:

"For all his success at the Bar, Coleridge was more at home on the Bench. He was dignified and urbane, and his presence was majestic. No other Chief Justice looked the part better than he did, and the charm and richness of his voice were in keeping with his high office. It was said that he could read a page out of Bradshaw's Railway Guide, and make it interesting. Thus at the age of sixty the friend of Archbishop Temple, Matthew Arnold, Tennyson, Cardinal Newman and many other famous men, was occupying the highest non-political position on the Bench, and for fourteen years he was one of the most prominent men in the country."

Coleridge led for the defence in the famous trial of Arthur Orton, the Tichborn claimant—the longest trial on record. His closing speech, which occupied twenty-six days, is said to be the very finest he delivered in the course of his career at the Bar. When Lord Chief Justice he presided at the famous trial popularly known as "The Baccarat Case," where

Col. Sir William Gordon Cumming sued Mr. and Mrs. Lycett Green for libel. Sir Edward Clark, one of the leading barristers at that time, appeared for Sir William and Sir Charles Russell for the defence. For a most graphic account of this world famous case I must again refer my reader to Charles Kingston's absorbing book.

It seems that in September, 1890, a small house party assembled at the residence of Mr. Arthur Wilson, a ship owner. The chief guest was the Prince of Wales, afterwards King Edward VII, and there were also present three other intimate friends of the Prince, including Sir William Cumming. For several evenings baccarat was played and one of the junior officers noticed that Sir William was playing unfairly. Not wishing to make such a charge against a gentleman of the baronet's standing in society, he waited until the following evening and then, with the aid of a friend, he discovered corroborating evidence of Sir William's cheating.

These two young officers immediately called the facts to the attention of the Prince, who instituted an informal "court martial," and upon Sir William's promise never to touch a card again, the incident was closed and all the guests dispersed to their respective homes all over England. But the secret was not kept and Sir William, finding himself shunned at his clubs, sought to right himself in the eyes of his friends by an action for libel against the entire party excepting the Prince of Wales.

Sir William had signed a confession of his guilt, but he



LORD CHIEF JUSTICE RUSSELL

strove to maintain that his signature had been coerced, and it was therefore necessary for the defence to prove the cheating. As everyone remembers, the Prince of Wales was one of the chief witnesses, which made the case known all over the world, and the efforts to secure seats in the courtroom were phenomenal. The Prince stated from the witness stand that he thought he was doing an old friend a very great service by letting him off so lightly. The speeches of both Sir Edward Clark and Sir Charles Russell were remarkable for their brilliance, but the jury found for the defendants and Sir William was branded as a cheat before the whole world.

Upon Lord Coleridge's death Sir Charles Russell succeeded him as Lord Chief Justice. One of Sir Charles Russell's trials which interested me more as a student than any of his other famous cases, excepting perhaps the Parnell case, was his defence of Mrs. Maybrick.

Mrs. Maybrick, daughter of a banker of Mobile, Ala., and her husband, a Liverpool cotton merchant, had met on an Atlantic steamer and were married in 1881, the husband being forty-two and the wife eighteen. They settled in Liverpool and lived there in some luxury for the next eight years, when the wife was indicted and tried for the murder of her husband, it being claimed that she had administered arsenic to him in sufficient quantities to cause his death. Their married life was at no time very harmonious and their constant disputes and bickerings were very much intensified, upon Mrs. Maybrick's return from a three day trip to Paris, by her confession to her husband that she

had spent the time there with her lover. For a year thereafter these bickerings continued, until suddenly Mr. Maybrick died. The exhumation and examination of the body showed the presence of arsenic.

Mrs. Maybrick was defended by Sir Charles Russell. It became one of the celebrated cases of the day, especially so as it was discovered that Mrs. Maybrick shortly before her husband's death had been collecting quantities of fly-paper and had been seen scraping the arsenic from the paper, although it was conclusively proved that Maybrick was a confirmed drug taker and had commenced taking arsenic as a tonic even before he left America. Strange as it may seem, the public, who were originally strongly prejudiced against Mrs. Maybrick, because it became known that she had been in Paris with her lover, nevertheless gradually turned to her side during the progress of the trial and after some very severe and supposedly unfair rulings of the presiding judge.

As I recollect it, Mrs. Maybrick, like other people accused of crime in those days, was not allowed to testify, but was permitted, if she wished, to make a statement from the dock. At the end of the trial Sir Charles Russell decided to allow his client to make her statement. But after the verdict of guilty it was Russell's opinion, as I remember it, that it was this decision of his that had played a large part in his client's conviction. It caused him a great deal of professional uneasiness, especially as he had allowed himself to be absent during the entire first day of the judge's charge

to the jury, in order to be present at the trial of an important railway case in an adjoining court.

His client had wanted to tell her story and he yielded to her wishes. In this statement Mrs. Maybrick admitted collecting arsenic from fly-paper, but claimed that her purpose was to use it only as a cosmetic. She failed to explain why it was necessary to extract arsenic in this manner either for use as a cosmetic or as a means of poisoning her husband, for it was shown that her husband had purchased 150 grains of arsenic in three different packages only two months before his death, and there was an abundance of this powdered arsenic still remaining in the house after his death. She also admitted on one occasion having mixed arsenic with her husband's food at his special request. These admissions were used against her with great force by both the attorney general and the presiding judge.

The public, however, got the idea that it was the unfair charge of Judge Stephen that had really brought about the conviction. The feeling ran so high that after the verdict, as the judge attempted to leave the court house and get into his carriage, it was only by the intervention of the police that he was saved from an attack by the infuriated mob. Later he was dubbed "The mad judge who presided at the trial of a beautiful woman for murder."

Prior to the trial there had been indications that the judge might be suffering from an insidious mental disease, and it is authoritatively stated that on the day following Mrs. Maybrick's conviction, when the judge was asked

to fix a day for a case that was to follow, he interrupted counsel by saying, "But Sir Charles may plead guilty." After the Maybrick verdict the fact that the epithet "Mad Judge" was attached to Judge Stephen's name became so humiliating to him that he never got over it and a few years afterwards retired from the Bench a broken man.

Mrs. Maybrick was sentenced to death, but the home office later commuted the sentence to one for life, and after serving fifteen years she was released as a "ticket-of-leave woman," as is the custom in England in all cases of life sentences. At the time the verdict of guilty was pronounced, the better legal opinion in England held that Mrs. Maybrick was not rightly convicted. True, the lover supplied a motive for the crime, especially as Mrs. Maybrick had broken her promise to her husband to end the intrigue, and had even been guilty of the unfortunate indiscretion of leaving her husband's bedside to write to her lover that he was "sick unto death." She confided this note to a maid to mail. It was intercepted and used at the trial as a damaging piece of evidence against her—that she should be forecasting the death of her husband at a time when the doctors were hoping for his recovery. On the other hand, there was strong expert medical opinion that her husband died from natural causes such as gastro enteritis, resulting from a long continued use of drugs. Even during the twelve days just preceding his death the doctors had themselves given Maybrick Fowler's diluted solution of arsenic, morphine, prussic

acid, papaine, iridium, phosphoric acid, jabondri tincture, antipyrine, sulphonal and ipecacuanha.

There is a story of Russell when he was Lord Chief Justice, in connection with a game of whist, of which he was very fond. He was called into a game one night with a guardsman who had been drinking quite heavily, and who was so noisy at the card table that finally Lord Russell threw down his cards, saying: "This is not whist, this is tomfoolery." Thereupon the guardsman replied, "Keep on your feathers, old cock, there's no harm done." In great indignation Lord Russell demanded of the guardsman, "Do you know whom you are addressing?" "Of course, I do," replied the half tipsy guardsman. "But remember you're not in your blasted old police court now."

In England the judges take a much larger part in jury trials than our judges are allowed to take in this country. An English judge often examines witnesses, and his influence is quite openly exerted to guide the jury and help them to avoid extremes and absurdities; and yet the crucial questions of fact are the jury's exclusive province to determine and are left absolutely to their unfettered decision.

Objections to questions by opposing counsel, which cut so large a figure in our American trials, are rarely made use of, and there is very considerable latitude as to what is and what is not a proper question. Even leading questions often pass unnoticed, but the laws governing evidence remain in England as they always have been.

An American lawyer will say, "I tried a case before Judge

so and so." An English barrister says, "I conducted a case which Judge so and so tried." *

A presiding judge has much more latitude in the Federal Courts than in our State Courts, but in both Federal and State Courts the jury have a right to expect that the judge will analyze the evidence and present clearly to them the questions of fact arising therefrom, while he leaves the jury to decide the issue. The judge is supposed to see to it that causes are not decided according to the comparative abilities of the counsel on one side and the other. No doubt it is extremely unpleasant to the advocate to have the impression made by an ingenious speech entirely eradicated by the emotionless but accurate process of the judge who follows him; but what is thus lost to the reputation of the advocate is gained to the administration of justice.

A reflection that forces itself upon the mind of anyone who has observed the machinery of our courts is to what a great extent the fate of men and causes must necessarily depend upon the temper and disposition of the judges who preside. This is especially true in the criminal courts, where one is constantly impressed with the fact of how different a prisoner's fate might turn out to be if tried before different judges.

Judge Noah Davis, at one time Chief Justice of our local Supreme Court, used to tell the story of having upon one occasion met Martin Grover, one of the really great judges who sat in the Court of Appeals at a time when the judges

* "Philadelphia Lawyer," Leming.

used to travel around in circuit. Meeting Judge Grover on one occasion, Judge Davis asked him how he was getting along and he replied: "I have so far *tried* 33 cases and have only lost one."

There is a similar story about John Van Buren, who once sauntered into one of our local courts and seated himself beside a friend who was conducting an important suit. After several questions had been put and exceptions taken, Mr. Van Buren, thinking that the ruling of the Bench was a little one sided, asked, in his peculiarly quiet way, "Who is on the other side in this case *besides the Judge?*"

My remarks on this subject are not made by way of criticism. The judges who take sides are often called "strong" judges. It certainly is not the theory upon which a litigant takes his controversies before a court. Neither am I suggesting any remedy to anyone who may think the practice referred to an unfortunate one; but it may occur to jurors—and I am always addressing them—that, however much partisanship a court may show for or against either side in a civil litigation, or for or against the prisoner in a criminal prosecution, the jurors always have it in their own power to see that justice is done in the end, for in the last analysis it is the jury that have the ultimate power in each and every case to determine the facts as they see fit.

Only last month, at Lewes, England, the trial of Patrick Mahon for murder was concluded. Hundreds of would-be spectators were turned away daily, as much as five pounds being frequently offered for a seat in the courtroom. Mahon

was accused of killing his sweetheart and cutting up her body in an effort to conceal the crime. He testified in his own behalf that during a visit to his bungalow she had had a violent quarrel with him and that, when each had the other by the throat, she had fallen backward, striking her head against the hearth in such a way as to cause her death. As the skull had disappeared, the Crown was powerless to contradict this story except by circumstantial evidence, such as the fact that the saw with which the body had been dismembered had been purchased by Mahon three days before the alleged quarrel, and that he had cashed checks bearing the girl's signature the day following her death.

I cite this case here for the reason that after the verdict of guilty, Mahon, upon being asked if he had anything to say why the sentence of death should not be pronounced, stood up and shouted that he was so stunned by the unfairness of the judge's charge and the attempts to prejudice the jury against him, that he found himself unable even to think of anything else! In this country anything in the record which reveals the slightest attempt on the part of the judge to influence the decision of the jury will surely lead to the upset of the verdict on appeal, no matter how conclusively the prisoner's guilt may have been shown. For instance, any reference whatever to the failure of the accused to take the witness stand in his own behalf invariably vitiates a conviction.

While in England the presiding judge is permitted to comment freely upon the facts and express his own opinion con-

cerning the sufficiency of the evidence, even in America where this privilege has been denied either by statute or by judicial decisions in at least two-thirds of the states, no experienced lawyer would advocate that the judges be made mere umpires or keepers of the peace, instead of being allowed to aid the jury in determining their verdict, and to give them the benefit of their superior knowledge and training.

It is impossible to exaggerate the importance of the demeanor of a judge when upon the Bench. He has no excuse for discourtesies; he should and usually does command the respect and consideration of all who come before him. Any show of impatience seriously impairs his usefulness. This is especially so in the case of inexperienced counsel, who should be encouraged, if not through kindness toward themselves, at least for the sake of the clients to whom it is the duty of the judge to see that justice is done.

"Where do you draw the line, Mr. Bramwell?" asked a learned judge in the Common Pleas Court. "I don't know, and I don't care, my lord. It is enough for me that my client is on the right side of it."

I maintain that for the average case the twelve men of the jury form the most perfect instrument which can be devised to administer justice, either in civil cases between man and man, or in criminal cases between the State and its citizens. And while I deprecate the limitation imposed upon our local judges in their conduct of jury cases, yet, should these judges not always bear in mind that any jury panel, after serving two weeks in trials conducted before the

same judge presiding every day, come to consider the judge almost as one of their own body? I am sure many a judge will confess, to his personal pride, his own conviction that after a few days of mutual work the jury usually come under his influence. Whether this is a good thing for the due administration of justice I do not pretend to say. It is a situation which exists and should be recognized by every juror who takes part in any trial.

Another thing that both judges and juries have to contend with is amusingly pointed out by Andrew A. Bruce, former Chief Justice of the Supreme Court of North Dakota, in his "The American Judge," just published, where he gives an instance of how supremely ignorant lawyers often are of the facts in their own cases, and how little aid they give to the courts and juries in deciding them.

"Not long since a case was argued in the Supreme Court of a western state in which the only point at issue was the legal consequence of the failure of the sheriff to attach his signature to a certain document or writ. The case was argued by counsel on both sides of the case on the theory that there was no such signature, and much law was cited. The court met in banc, discussed the case, came to a tentative decision and a judge was assigned the duty of writing the opinion. He did so and in it held that the failure of the signature rendered the proceedings invalid. The remaining judges then concurred in the opinion and decision. Just before the court was to meet, however, and the decision was to be publicly announced, the judge decided to make a

personal examination of the original record and the original paper, and much to his surprise discovered that, after all, *the signature had been attached.*"

I presume the public will always be convinced that the mere elevation of any lawyer to the Bench gives him learning and wisdom, whether he had any before or not. It matters not what the profession may have thought of him before he became a judge or while he was practicing as a lawyer. Although his opinions on the law may not have been received before he ascended the Bench, yet his opinions given from the Bench become law for the time being at least, and the layman naturally takes the judge at his face value.

I read recently in an English magazine of a judge whose career at the Bar had been far from conspicuous, and when he was first appointed a judge he had the folly to tell Sir Charles Russell that he considered his cross-examination of a certain witness "wearisome and pointless." The story proceeds in this wise:

"The greatest cross-examiner in England glared at his lordship in speechless amazement for a moment, and then replied, fiercely, 'Oblige me by holding your silly tongue until somebody speaks to you.'"

It is difficult to imagine any lawyer in this country presuming to use such language to any of our own presiding justices, even though he held a position relative to that held by Sir Charles Russell, at that time, at the English Bar; but I do not suppose there is a leading lawyer at our own

local Bar who has not, on some occasion or other, been tempted to indulge in just such an outburst.

Perhaps it is well for a juror to bear in mind that just because a lawyer has been elevated to the Bench, that fact does not necessarily endow him with learning, regardless of whether or not he possessed any before. I cannot help repeating the advice Lord Chief Justice Mansfield, the first Scotchman who ever gained distinction in the practice of law in England, gave to a newly appointed judge: "Decide promptly, but never give any reasons for your decisions; your decisions *may* be right, but your reasons are likely to be wrong."

This seems to be quite a favorite topic with many of the Lord Chief Justices. Chief Justice Christian, when he was Chief of the Irish Court of Appeals, displayed this same feeling toward newly appointed judges. When sitting on the Bench with two colleagues, if they happened to differ in opinion, he would get each of them to state his decision and his reasons therefor, and when the Chief Justice pronounced his own decision, it sometimes took this laconic but not altogether flattering form: "I agree with the decision of my brother on the *right*, for the reasons as stated by my brother on the *left*."

"Sergeant Adams was trying a case of nuisance, and in his summing up, at the close of the evidence, he enlarged at portentous length on a definition of the offense, and the various elements that were required in proof of it, until the jury became thoroughly tired of listening to him. When

he had concluded, and was passing the jury-box to get to his room, he said to the foreman, 'I will retire while you are deliberating on your verdict, which requires much consideration; but I hope you understand the various points I have submitted to you.'

"'Oh, yes, my Lord,' said the juryman. 'We are all agreed that we never knew before what a nuisance was, until we heard your lordship's summing-up.'"

A brutal retort was once made in Massachusetts by General Benjamin F. Butler, who appeared in a case in conjunction with several other lawyers, all of whom agreed in disregarding the very existence of one of these newly appointed judges on the Bench. At last, his Honor, in desperation, appealed to counsel with the remark, "What do you gentlemen suppose I am here for?" Butler paused for a minute, pressing his hand over his forehead, and replied, "By the Holy One, your Honor has me there."

One of these newly elected judges, whose name perhaps had better not be mentioned, lately interrupted an argument that was being made before him with the remark: "Counsellor, what you are saying only goes in one ear and out the other." "I am not surprised at that, your Honor," replied the lawyer; "for what is there to prevent it?"

I have it on the best authority that the English judges seldom forget that they were themselves once barristers, and likewise the barristers seldom forget that they may one day become judges. This could hardly be said, however, of a

* "Bench and Bar," by Robinson.

contretemps that occurred once between Sir Charles Russell and a newly appointed judge, who happened to be very well acquainted with Russell while at the Bar. This judge apparently presumed upon his acquaintance with Russell to interrupt him again and again in his argument. Russell threw down his brief with the remark, "My lord, what may be the manners of the place from whence you come I know not, but I do know that until now judges treated the Bar as gentlemen, and as long as I am of the Bar, I will submit to be treated in no other way." Russell left the court. The judge, so the story goes, hastily sent a messenger after him, and when Russell returned the judge apologized humbly—and there were no more interruptions.

There is one striking difference between the English juries and our own American juries, especially in the criminal courts. The English judges rarely have to appeal to an English jury for a conviction, but frequently they are obliged to urge them to an acquittal. Judging from my own experience the juries in America are only too ready to acquit, and one of the judge's most disagreeable duties is to strive for a conviction where the public safety is at stake. The English judges have been known to drop a little hint or even practically to acquaint the jury with the fact that the prisoner is not likely to suffer very much if they do convict him.

One Irish judge, both a Tory and a Protestant, charged one of his juries that undoubtedly the prisoner had broken the Statute complained of, but "they would be a queer set

of Irishmen if they couldn't find a way of getting around an Act of Parliament."

There is one story I remember hearing many years ago which I can never forget, and which I would like to bring to the attention of every American judge who sits in our criminal courts. In a case where the evidence upon which a conviction was asked was palpably insufficient, but where a jury nevertheless found the prisoner guilty, the learned judge commanded the prisoner to rise and then proceeded to address him, as I recollect it, somewhat after the following fashion:

"Prisoner at the Bar, you yourself think that you are innocent; your lawyer thinks you are innocent; the prosecuting attorney seems to think that you may be innocent; the judge on the Bench feels that you are innocent. And yet the jury, with their superior knowledge of men and things, have found you guilty. It is therefore my bounden duty to sentence you. I therefore sentence you to one day, and, as that day was yesterday, you are free to take your hat and coat and leave the courtroom."

One can hardly help contrasting the conduct of this judge with that of another who concluded the trial of a man for murder by sentencing him to be hanged the very same day. A petition was immediately signed by the Bar, the jury and many people, praying that a longer time might be granted the unfortunate prisoner. The judge replied to the petition, that the man had been found guilty; that the jail was very unsafe and besides it was very uncomfortable; and that he

did not think any man ought to be required to stay in it any longer than was absolutely necessary!

In England the criminal courts are conspicuous for the speed as well as the simplicity and directness with which a prisoner is brought to trial. I am told it is not unusual for a man accused of a crime committed the first of any month to be tried during that month, and if conviction follows and a sentence of death results, for him to be executed the following month. This expedition in criminal prosecutions, it is claimed, is due to the absence of irrelevant testimony and all imaginative arguments. Counsel attempting any of these subterfuges are so certain that they will be excluded by the presiding judge that the custom has almost entirely gone out of practice, and the public are seldom treated to prolonged spectacular, sensational trials.

At the present time in our own country nobody will dispute the fact that life and property are altogether too insecure. Perhaps one of the gravest concerns today is the inadequate and lax enforcement of law through deficiency in administration of the criminal law, especially with regard to crimes of violence threatening the security of life and property. On this question of the unfortunate showing that we make as compared with other nations like Great Britain and France, a special committee of the American Bar Association has recently made an illuminating report.

It appears from this report that there occurred 17 murders in London in 1922, every one of which was solved. In 1922 there were only 63 murders in all England and Wales, while

in that same year there were 260 murders in New York City alone and 137 in Chicago. From this report it also appears that in 1921 there were only 95 robberies throughout all England and Wales, and in 1919, 121 robberies throughout all France; whereas in 1922 there were reported 1445 robberies in New York City alone and 2417 in Chicago. The years do not quite correspond, but the comparison is most impressive, nevertheless.

One can hardly draw any other inference from these figures than that the criminal processes in this country are too dilatory, that the juries are too indulgent and perhaps even that the judges are too lenient in their sentences. Beyond doubt it is the speedy trial and conviction of a criminal, much more than the severity of the punishment, that serves as the greatest deterrent to crime. On the other hand, the fact that so many serious crimes go unsolved in this country, and therefore unpunished, cannot but impress our criminal classes with the absurdly small percentage of risk they run. There would appear to be little remedy for this state of affairs other than the speediest prosecution, conviction and punishment that is possible in any given case.

In England for half a thousand years the hangman lay in wait for every petty offender. To produce the maximum deterrent effect the execution of malefactors was made a public spectacle. Gradually the authorities began to realize that it is not the severity but the certainty of punishment that gives its deterrent effect. In consequence the crimes punishable with death were gradually reduced to two:

murder and treason. And when fully a hundred thousand spectators assembled to witness a certain public execution in Scotland it was thought time to abolish public executions altogether, and ever since that time the public have been debarred from such scenes.

In England, with their highly efficient methods of administering criminal justice, it is calculated that they arrest and punish one out of every six malefactors. In this country, with our more slipshod methods of detection and criminal procedure, it is estimated that not one murderer in ten is apprehended and not one in twenty punished, and that one rarely with death.

If I may be pardoned a still further reference to statistics, it is instructive to note that in the year 1920, in the city of Chicago, when by a special effort seven men were executed and eight more sentenced for murder, three hundred and thirty murders were committed in the same jurisdiction; 4.5 per cent. were unlucky enough to be caught, convicted and hanged, while 95.5 per cent. escaped any legal penalty!

Mr. R. T. Bye, in his treatise, "Capital Punishment in the United States," declares that out of more than seven thousand homicides (estimated) in the United States in 1917, only eighty-five were executed. "That means," he says, "that only one man in eighty who commits a homicide in this country suffers death for it."

When one realizes that the type of lawyer that usually falls to the lot of the poor in our criminal courts, owing to their lack of financial resources, leaves them too often at the

mercy of the shrewd and practiced district attorney whose business it is to convict, and that clearly for such as these the dice of justice would appear to be loaded, one can only draw the conclusion that it must be the jurors who are really to blame for their failure to enforce the criminal laws made for their own protection. I have known of a jury failing to agree in a perfectly clear case of guilt, simply because one of their number felt that the prisoner had not been represented by a competent lawyer, although he agreed with the other eleven that there was no doubt about the prisoner's guilt.

A careful study of the statistics gathered throughout the United States, as well as in foreign countries, leads one to the conclusion that it makes little difference in the prevalence or scarcity of homicides whether the punishment is death or life imprisonment, and that the deterrent effect of capital punishment appears to be largely mythical and not much more than an imaginary factor. That being the case, and considering the further fact that the severity of the punishment is one of the greatest stumbling blocks in the minds of jurors who would otherwise agree to convict, the question of the abolition of capital punishment altogether becomes one of unusual present day importance.

Thomas Leming, Esq., of the Philadelphia Bar, wrote a book in 1912, a year before his death, called "A Philadelphia Lawyer in the London Court," which I can strongly recommend to anybody interested in English procedure. It appears that in England the trials, both civil and criminal,

are especially distinguished by the swiftness and common sense with which they are conducted by English barristers. I am sure we should all,—lawyers, jurors and spectators—be envious to learn that there is an *abundance of hearty good humor*, and that the proceedings are decidedly crisp. There may be an entire absence of declamation, but at the same time the judges see to it that there is an avoidance of monotony.

Mr. Leming calls the English courts the most up to date in the world. He says the administration of the law is prompt, simple, free from formality, thoroughly in touch with the ordinary man's everyday life. "The Englishmen appear at their best in their courts, for there they lead the world." And yet their procedure is so similar to our own that any experienced American trial lawyer could put on a wig and gown and find himself otherwise quite at home in an English Court.

Mr. Leming gives a most interesting account of a trial he witnessed as a guest beside the judge on the Bench, and conducted at the court officially known as the Central Criminal Court, but popularly known as "The Old Bailey." He says that this court house occupies the site of the ancient Newgate Prison, where for nearly seven centuries the prisoners of London expiated their crimes. They were tried, and if convicted, hanged on the premises or thrown into Newgate Prison, which from time immemorial was so crowded and so ill-ventilated and so poorly supplied with water that it was the hotbed of a disease known as "prison fever." At a

of the court house for an excellent, substantial luncheon served by butler and footmen in blue liveries, with brass buttons, knee-breeches and white stockings. The luncheon table looks odd with the varied costumes, the rich blues, the bright scarlets and the wigs of the party who, no longer on duty, relax into jolly sociability. Indeed, one cannot escape the impression that he has in some way joined a group of 'supes' from the opera who are snatching a light supper between choruses.

These are some of the picturesque features of the Old Bailey which at the same time is the theatre of the most sensible and enlightened application of law to the everyday affairs of the largest congregation of human beings the world has ever seen.

contagion of prison fever, and that the ancient custom has survived the introduction of disinfectants and modern sanitation in the cells.

The Bar and audience rise and through a door leading to the dais enter the two sheriffs, gowned in dark blue robes, trimmed with fur; then comes the under-sheriff in a very smart black velvet knee-breeches suit, white ruffled shirt, white stockings, silver-buckled shoes, cocked hat under arm and scabbard at side. The sheriffs bow in and usher to his seat the judge, who is arrayed in wig and robe. This, in the case of the Lord Chief Justice or one of the judges of the high court, is a brilliant scarlet, with a dark blue sash over one shoulder, and in the case of a common sergeant, is of sombre black. The whole group affords a dash of color in striking contrast with the dark setting.

The judge having seated himself in the chair, so cumbersome as to require a track to roll it forward sufficiently close to the desk, the sheriffs dispose themselves in the seats not occupied by the judge, and later quietly withdraw. They have no part in the proceedings, their only function being to usher the judges in and out and to entertain them at luncheon, the judges being by custom their guests. The judge having taken his seat, the Bar and public do the same, and the business begins. There are usually two such courts sitting at the Old Bailey—sometimes three of them.

At lunch time the sheriffs again escort the judges from their seats and all the judges, sheriffs, under-sheriffs and any guests they may invite assemble in the dining room

of the court house for an excellent, substantial luncheon served by butler and footmen in blue liveries, with brass buttons, knee-breeches and white stockings. The luncheon table looks odd with the varied costumes, the rich blues, the bright scarlets and the wigs of the party who, no longer on duty, relax into jolly sociability. Indeed, one cannot escape the impression that he has in some way joined a group of 'supes' from the opera who are snatching a light supper between choruses.

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CHAPTER VII

JUDGES (continued)

NEARLY everybody who has anything to do with our courts discovers that, after all is said and done, his principal interest usually centers in "His Honor the Judge." This has been, from time immemorial, especially the case in England, where the judges, for centuries, held the center of the stage, second only to Royalty itself.

In England the Lord Chancellor is the holder of the Great Seal of England. He is the First Officer of State, the President of the House of Lords, as well as the head of the judicial system of the Kingdom. In the English popular mind he represents all that is most elevated in dignity and power. In former times he was the "Keeper of the King's Conscience," the nominator of all inferior judges and by far the largest dispenser of Church patronage.

In England, especially in modern times, judges are usually selected as a well earned reward for unusual talents at the Bar. Unfortunately this is sometimes not the case in this country. Our judges in many states are the product of political organizations, and sometimes owe their elevation to the Bench to other considerations than their personal reputations as lawyers; and yet, almost without exception,

they enjoy high repute in their communities as honest and industrious public servants.

In England judges are appointed for life, and the barristers, who have earned their judgeships because of their prominence as lawyers, usually try to prove that they can be as great judges on the Bench as they were astute trial lawyers when practicing at the Bar. English judges seem to be held in greater awe and respect than our American judges; not that our own judges are lacking in ability or morals, but the whole system is different in this country. Our judges are very much underpaid, as well as being overworked, and the most successful advocates usually have no ambition to join their number.

A trial lawyer of reputation will often earn in a single litigation more than the entire year's salary of the judge who presides at the trial. Every now and again the attention of the public is drawn to this lamentable state of affairs, but the movement soon fades away, as it meets with little or no support from the local and legislative authorities who have it in their power to right the wrong. Until our New York judges are appointed for life, and are properly paid for the work they do, instead of owing their election to the popular vote of people who know next to nothing of the qualifications of the candidates, but cast their votes as members of political parties rather than as individuals, there is little hope for any great change in the personnel of our courts.

These remarks apply especially to the Magistrates' Courts and the Municipal Courts, the tribunals called

properly the poor man's courts. It is from these minor courts that the great masses of the plain people derive their idea of American justice, as the source of protection for themselves and their belongings. The following anecdotes illustrate the scenes often enacted in some of our lower courts, where three judges sit in banc to try minor offences.

"Will your Honors please fine me \$10, for contempt of court?" asked a defeated attorney.

"For what?" asked the astonished magistrate. "You have committed no contempt of court."

Attorney: "I assure you, your Honors, that I have an utter contempt for it."

The three judges on the Bench conferred and then one of them remarked: "We might possibly be willing to fine you \$5 for contempt, Mr. Blank, were we not in doubt which of us you would try to borrow the money from to pay it."

A lawyer in Chicago, by the name of Parsons, was once trying a case before a jury in another of these minor courts. He appeared as counsel for the prisoner. The judge was very hard on him throughout the trial and the jury promptly brought in a verdict of guilty. Parsons moved for a new trial. The judge denied his motion and remarked: "The court and the jury think the prisoner a knave and a fool."

Instantly the counsellor replied, "The prisoner wishes me to say he is now perfectly satisfied, as he feels that he has been tried by a court and jury of his *peers*." *

While England has produced some of the greatest judges

* "Bench and Bar," Bigelow.

of history, so she has also produced the wickedest. This was especially so three centuries ago in the reign of the Stuarts, when such Kings as James II and Charles II chose their judges because of their vicious qualities and their willingness to follow the dictates of the Crown.

Upon the same principle as that there is more joy in the Kingdom of Heaven over one sinner that repenteth than over the ninety and nine other poor souls who have tried to live normal, useful lives, I find myself inviting your attention to the two wickedest judges the world has ever known. In any event, crime in print always seems to have a greater appeal than virtue—and certainly nothing in judicial history can approach the careers of Lord Chancellor Jeffreys in England and Lord Braxfield, the counterpart of the infamous Jeffreys, the “Jeffreys of Scotland.” An ancient historian has called both of these celebrated characters by the gentle phrase, “Bloodthirsty Wearers of the Ermine.” It might well serve as an epitaph and be engraved on their tombstones, that all future generations might be reminded of their perfidy.

The life of Jeffreys serves as a most striking example of the far-reaching consequences of investing such characters with the power and authority that usually go with elevation to the Bench. This was especially true, of course, in the seventeenth century, when the judges felt that they had the authority of the king himself to pronounce their heartless sentences.

Gradually the lawmakers have striven to curtail and

limit the powers of a judge in many different ways, including the right of appeal. In England the judges still have the right to express their opinion of the witnesses and the evidence when charging the juries,—in criminal cases even to the point of revealing to the jury their own conceptions of the guilt of the prisoner. In this country, however, if we exclude our Federal Courts, we have seen that the judges are practically bound hand and foot against any oral effort upon their part to influence the verdict of a jury. A court stenographer takes down every remark of the judge, every ruling on questions of evidence and every word of his charge to the jury, and this record is subject to review by an appellate court.

Only the *spoken* words from the Bench can be thus recorded, however. It is impossible to reproduce in print, for appeal, the expression of face, the tone of voice, or the gestures which can so eloquently convey to a jury the opinion of a judge. I am not meaning to criticise; I am only pointing out this fact to my readers. In the last analysis, however, it is for the jury and the jury alone to render the decision, and no judge, however much inclined, can influence the verdict of a jury—*unless the jurors let him*.

John Philpot Curran, the celebrated Irish wit, in one of his trials was pressing the jury rather intently, and the judge irritated him by constantly shaking his head, thereby indicating to the jury that the court did not agree with what was being said. "Gentlemen of the jury," commented Curran at last, "you may have noticed his lordship shaking

his head. I ask you to pay no attention, because if you were as well acquainted with his lordship as I am, you would know that when he shakes his head *there is nothing in it.*"

A very large part of my professional life has been spent before juries, and I have learned to regard them with the utmost respect. Physicians spend their lives among their patients and become sincerely attached to them during their efforts to heal them. A lawyer feels much the same way after he has spent a life time in trying to persuade jurors to see the light and decide cases in his favor; and while a lawyer sometimes meets with incurable cases, just as a physician does, yet the vast majority of jurors seem to me to try to do the right thing and come nearer the mark than any other tribunal yet devised. With this slight digression anent my personal affection for all jurymen, let us proceed to the wicked judges and their influence with jurors of their day and generation.

Thirty years ago, Andrew D. White, in a lecture on the problem of murder in the United States, showed by statistics that there were at that time approximately 50,000 unconvicted murderers in this country. This hardly could have been the case when such judges as Lord Chancellor Jeffreys and Lord Braxfield held sway in the criminal courts with or without a jury.

Naturally I know nothing of these judges excepting what I have culled from such sources as the celebrated works of Lord Campbell,—“The Lives of the Lord Chancellors of

England," "Lives of the Chief Justices"—and Macaulay's "History of England." These ten closely printed volumes are classics and should be read by every ambitious young lawyer, but one could hardly expect the merchant or lay reader to wade through their musty pages. I have therefore refreshed the memory of my student days from books that to the present generation are little more than drowsy, voluminous memories, and will confine myself to such scattered excerpts as are likely to interest and enlighten the casual reader whose thoughts turn occasionally to matters pertaining to the courts.

Lord Campbell, who, by the way, rose from a reporter in Parliament to be Lord Chancellor of England, established his literary reputation by his charming books about the Chancellors and the Chief Justices. I have read that these books are conspicuous for their many inaccuracies and for their total absence of original thought and inquiry. Be that as it may, one thing is certain: that as a painter of the social history of his profession he was without an equal in literature.

Of all the Lord Chancellors ever produced by England, the most infamous and hated name in history, not only of England, but of any country in the civilized world, is that of Lord Chancellor Jeffreys. He pronounced the death sentence probably more times than any justice who ever presided over any court, and what is more, he is reported to have taken a fiendish delight in the imposition of extreme sentences. He was admittedly a man of high talents, of



LORD CHANCELLOR JEFFREYS

singularly agreeable manners, entirely free from hypocrisy, but his cruelty and his political profligacy knew no bounds.

There is a story not universally believed, that when a stranger, a boy of eighteen, he boldly put on gown and wig and walked into a court, and having thus constituted himself a barrister, not only won verdicts but continued to practice with considerable applause. He was always devoted to his clients and very much in earnest as long as the trial was going on, but when it was over he would get recklessly drunk, as if he were never to appear in court again. After his elevation to the Bench he was soon known as the "worst judge that ever disgraced Westminster Hall."

During his early career at the Bar he was very much pressed by creditors and involved in much financial difficulty. He was a handsome man, capable of making himself most attractive to women, and it is said that he resolved to repair his fortunes by marrying an heiress, and soon picked out the daughter of a country gentleman of large possessions. This daughter, still very young, was cautiously guarded and almost constantly confined to her bedchamber. Jeffreys contrived, however, to make a *confidante* of a poor relation of hers, the daughter of a country parson, who lived with this lady as a companion. In this way he managed to correspond with the heiress, and obtain her promise to elope with him, provided her father would not give his consent to the marriage. But, the story goes: "After his return to his dismal chamber in the Inner Temple which he had hoped soon to

exchange for a sumptuous manor house, he received a letter from the companion informing him that his correspondence with the heiress had been discovered by the old father, who was in such a rage that, locking up the companion, he had instantly turned the daughter out of doors, and she was consequently in a state of great desolation and distraction. Jeffreys went to her at once, found her in tears, and offered her his hand in marriage. Whereupon the father, to save his daughter's reputation, sanctioned the union and gave his daughter a fortune of £300!"

It is said that "never has a young lawyer ridden so rapidly into practice." Yet from the very outset there was no art, however low, to which he would not resort with a view to getting on. He used to sit in coffee houses and order his clerk to come and tell him that company attended him at his chamber. At which he would assume a huff and say, "*Let them stay a little, I will come presently!*"—and thus made a show of business.

His one thought seemed to be how to plan to climb to a high office. For this purpose he became friendly with "the Trusty Page of the Back Stair," a man who was entrusted by King Charles II to discover secrets of any consequence in any department of life. Now as Jeffreys was a constant drinker, he would let none of the king's friends part with him sober, if it was possible to get them drunk, and in this way he discovered many secrets and learned of many men's characters through friendships such as grow up between drinking companions. All this resulted in his being recom-

mended to the king as the "most useful man that could be found to serve his Majesty in London."

Such services, naturally, did not go unrewarded, and Jeffreys soon became the Chief Justice of Chester, and later Recorder of the City of London. The office of Chief Justice of the King's Bench was his next aspiration, and it was in consequence of his services in connection with the prosecution of Russell that he became Chief Justice of England in 1683. One of his first exhibitions in the Court of the King's Bench, which horrified the public, was the condemnation of Sir Thomas Armstrong. It must be stated that this gentleman was outlawed beyond the seas, and being sent from Holland within the year, sought before the King's Bench, according to his clear right in law, to reverse the outlawry. Armstrong was attended by his daughter, a most beautiful and interesting young woman. When the Chief Justice had illegally overruled the plea and had pronounced judgment of death under the outlawry, she exclaimed, "My Lord! I hope you will not murder my father."

Chief Justice Jeffreys: Who is this woman? Take her into custody. Because your relative is attainted for high treason, must you take upon yourself to tax the courts of justice for murder, when we grant execution only according to law? Take her away.

Daughter: God Almighty's judgment light upon you.

Chief Justice Jeffreys: God Almighty's judgment will light upon those that are guilty of high treason.

Daughter: Amen. I pray God.

Chief Justice Jeffreys: So say I, and I thank God I am clamor-proof.

(The daughter is committed to prison and carried off in custody.)

Sir Thomas Armstrong: I ought to have the benefit of the law and I demand no more.

Chief Justice Jeffreys: That you shall have by the grace of God. See that execution be done on Friday next according to law. You shall have *the full benefit of the law!*

Armstrong was hanged, disembowelled, beheaded and quartered accordingly. In reward for this trial the king presented to Jeffreys a valuable ring which he took from his own finger and which was called Jeffreys' *bloodstone*.

By this time Jeffreys had made up his mind to do everything he could to please the court, in order to secure the ambition of his life, the Lord Chancellorship. He was content to bide his time and to "wade through slaughter" for the seat he so much coveted, which he could well do, for he was already confirmed in the office of Chief Justice of the King's Bench. One of Jeffreys' first trials as Chief Justice resulted in a verdict of guilty of the crime of perjury, whereupon Jeffreys imposed the following sentence:

"To pay on each indictment a fine of one thousand marks; to be stripped of all his canonical habits; to be imprisoned for life; to stand in the Pillory on the following Monday with a paper over his head declaring his crime; the next day to stand in the Pillory at the Royal Exchange with the



TRIAL OF SIR WILLIAM ARMSTRONG

same inscription; on the Wednesday to be whipped from Aldgate to Newgate; on Friday to be whipped from Newgate to Tyburn; upon the 24th of April in every year during life to stand in the Pillory at Tyburn opposite the gallows; on the 9th of August in every year to stand in the Pillory opposite Westminster Hall Gate; on the 10th of August in every year to stand in the Pillory at Charing Cross and the like on the following day at Temple Bar; and the like on the 2nd of September every year at the Royal Exchange. The court expressing deep regret that they could do no more, as they would not have been unwilling to have given judgment of death upon him."

Later Jeffreys was appointed at the head of a special commission to try criminals on what was called the Western Circuit. At the same time he was invested with the authority of Commander-in-Chief over all His Majesty's forces within such limits, and after that he never moved without a military escort, sentinels being mounted at his lodgings and the officers on duty sending him their daily reports.

Lord Campbell refuses to shock the humane feelings of his readers by any detailed statements of these "bloody assizes." But as an instance he gives a short account of the treatment experienced by Lady Alice Lisle, "with whose murder it commenced." It seems that she was the widow of Major Lisle, who had sat in judgment on Charles I and had later been assassinated at Lausanne. The wife remained in England and had been noted for her loyalty as well as for her piety. The charge against her was

that she had harbored in her house one Hickes, who had been in arms with the duke at Monmouth, "*she knowing of his treason.*" She had received Hickes into her house, thinking merely that he was prosecuted as a Non-conformist, but the moment she knew whence he came, she sent her servant to a Justice of Peace to give information about him. The principal traitor had not yet been convicted and there was not a particle of evidence to show that Lady Lisle, at the time she took Hickes into her house, was acquainted with or even suspected any act of treason.

She was not allowed counsel, but she had the common sense to raise for herself the objection that the principal traitor ought first to be convicted because, if by any chance it turned out that he was not a traitor, certainly she ought not even to be tried for harboring him. And she urged with great effect that she was entirely innocent of any suspicion that Hickes had participated in any rebellion, which she strongly disapproved, having even sent her only son into the field to fight under the royal banner.

But the Right Honorable Sir George Jeffreys, Lord Chief Justice of England, had determined Lady Lisle's fate even before he left London to preside at her trial at Winchester. Her conviction could be nothing short of a judicial murder. He thought not only to placate the king thereby, but at the same time to strike terror into the ranks of the opposite political party by the very savagery with which he conducted the prosecution. Lady Lisle was a poor Christian woman, a widow, well advanced in years and very frail and

deaf. All during the trial someone had to stand by her side and inform her of what was taking place in court. She was so infirm that she slept through much of the trial while the judge was browbeating the witnesses in his attempt to elicit some evidence against her.

The principal witness in the case was a man by the name of Dunne, who could testify to nothing truthfully which would attribute guilty knowledge to the unfortunate prisoner. But Jeffreys kept prodding at this witness well into the night session with such ejaculations as "Jesus God, you see, gentlemen, what a precious fellow this is—a knave that nobody would trust for half a crown between man and man." And a little later, "Oh, blessed God, was there ever such a villain on the face of the earth? Hold the candle to his face that we may the better see his brazen countenance." Finally the witness mumbled in despair and fear, "My lord, I am so balked I do not know what I say myself. Tell me what you would have me say, for I am cluttered out of my senses." Whenever the prisoner herself attempted to say anything in her defence, the judge would interrupt her with the promise that she could say it "later on," which occasion he took pains to see should never arise. The jury three times refused to find a verdict of guilty, and three times Lord Chief Justice Jeffreys sent them back to "reconsider" their verdict, and finally bullied them into pronouncing a verdict of guilty.

Remark his sentence! "That you be conveyed from hence to the place from whence you came, and from thence

you are to be drawn on a hurdle to the place of execution, where your body is to be burned alive till you be dead, and the Lord have mercy on your soul!" Jeffreys even made plans to have the sentence carried out the following day, but there were many applications for her pardon and the king finally changed her punishment from that of burning alive to that of beheading, which punishment was promptly carried out on a scaffold set up in the market place at Winchester. Just before the execution Lady Lisle handed a paper to the sheriff which read, "I have been told the court ought to be counsel for the prisoner; instead of which there was evidence given from thence; which, though it were but hearsay, might possibly affect my jury. My defence was such as might be expected from a weak woman; but such as it was I did not hear it repeated to the jury. But I forgive all persons that have done me wrong and I desire that God will do so likewise." *

It seems that from Winchester Lord General-Judge Jeffreys next proceeded to Salisbury, where he was obliged to content himself with whippings and imprisonments for indiscreet words. But when he got to Dorsetshire, his charge to the Grand Jury threw the whole country into a state of consternation, and bills of indictment for high treason were found by the hundreds. "Often without evidence, the Grand Jury being afraid that if they were at all scrupulous they might be brought in as aiders and

* Judge Parry in his "Drama of the Law," recently published, gives a most graphic and dramatic account of this trial.

abettors." At this juncture Judge Jeffreys learned that his predecessor as Lord Chancellor had died. He had no doubt that he would be the successor, and, in consequence was in great haste to return to London lest, by intrigue, some other judge might be appointed in his stead.

If all the prisoners who had been indicted should be tried, Jeffreys' return to London would be indefinitely postponed. He therefore conceived the expedient and openly proclaimed "that if any of those indicted should relent and *plead guilty* they would find him to be a merciful judge, but that those who put themselves on trial, if found guilty, would have little time to live, and had better spare him the trouble of trying them." But it is said that the prisoners, knowing the judge and having some hope from the mercy of their countrymen on the juries, refused to plead.

The judge, therefore, was obliged to begin on a Saturday morning with a batch of thirty prisoners. That same evening he signed a warrant to hang all thirty of them on the following morning. One prisoner objected to the competency of a certain witness called against him, which elicited from the judge the exclamation—"Villain! Rebel! Methinks I see thee already with a halter about thy neck." And he was the first one to be hanged, his Lordship declaring "that if any with a knowledge of the law came his way, he should take care to *prefer* them."

On the Monday morning, the court sitting rather late on account of the executions, the Judge, on taking his place,

found many applications to withdraw the plea of not guilty and the prisoners pleaded guilty in great numbers, but his ire was now kindled and he would not even affect any semblance of mercy. Two hundred and ninety-two more of these unfortunates received sentences of death, and of these seventy-four actually suffered, some being sent to be executed in other towns and in almost every village for miles around. The whole country was covered with quarters of human beings, and to this day the tradition still lives of the horror then created.

Jeffreys now hastened homeward to pounce upon the Great Seal. Throughout the whole proceedings his sole object was to please his master, whose disposition was most vindictive, and who thought that by such terrible examples he could secure to himself a long and quiet reign. After Jeffreys returned from the west, by royal command he stopped at Windsor Castle, and after a most gracious reception the Great Seal was delivered into his hands and he became Lord Chancellor of England.

The very first measure which James II proposed to his new Chancellor was the hanging of an alderman, as he was afraid of any mutinous spirit in the city which might break out. Accordingly, one Alderman Cornish was brought to trial before a packed jury and executed on a gibbet erected in Cheapside, upon the pretext that some years before he had been concerned in what was known as the Rye House plot.

Shortly afterwards the Lord Chancellor came before the king upon the question of the indictment of the seven

bishops, which, it is said, more than any other act of misrule during his reign led to King James' downfall. Many counselled giving up the idea of arraying the whole Church of England against the authority of the Crown, and advised him that the bishops should merely be admonished, but Jeffreys induced him to insist upon their punishment, and after various attempts to get them to admit their participation in the libel the bishops were arraigned and sent to jail and later tried.

After Jeffreys had heard of the flight of King James, he was thrown into a state of great consternation, and being afraid of punishment from the new government which was being established, and dreading still more the fury of the mob,—for he well knew that there was a very eager desire in the hearts of the people to prevent the king's counsellors from escaping—he began to realize that he would probably be one of the first victims demanded.

He still went under the title of Chancellor, but he concealed himself in an obscure dwelling of a dependent in Westminster near the river, and there made preparations for his escape. To avoid all chance of being recognized by those who had seen him in ermine or gold brocade, he put on the worn-out garb of a common sailor and covered his head with an old soft hat. The next morning he made his appearance in a little ale house, where, having breakfasted with his hat on his head, he was so sure of his disguise that he put his head out of the window to look at the passers by.

It so happened that once there was a suitor in Jeffreys'

court whose case was about to be dismissed, when someone made the charge that the plaintiff was a trimmer, at which Jeffreys exclaimed: "A trimmer! I have heard much of that monster, but never saw one. Come forth, Mr. Trimmer, turn you around and let me see your shape." He berated him in this fashion so long that the poor suitor was ready to drop but finally got away, and in the hall one of his friends asked him how he came off. "Came off?" said he; "I am escaped from the terrors of that man's face, which I would scarce undergo again to save my life, and I shall certainly have the frightful impression of it as long as I live." It happened by an extraordinary chance that this same man was walking on the opposite side of the way at the very moment the Lord Chancellor put his head out of the window. This man thought he recollected the features of the sailor who was gazing across at him. An immense multitude of people collected around the door of the tavern, as soon as the witness announced that the pretended sailor was no other than the wicked Lord Chancellor Jeffreys. There was a great hue and cry and the crowd began to assault and pelt him, but he was rescued and taken to the Lord Mayor's. It is said that Jeffreys, seeing his imminent danger and realizing that he was so near the end, lost all sense of dignity, all presence of mind, and held up his imploring hands, sometimes on one side of the coach and sometimes on the other, exclaiming: "For the Lord's sake, keep them off! Keep them off!" He reached the Tower finally in safety, and died miserably there at the age of forty-one.

Jeffreys was universally assailed by the press. A letter was addressed to him advising him to cut his own throat, and an actual petition was received by the Lords of the Council of England from "The Widows and Fatherless Children of the West" beginning: "We to the number of a thousand and more widows and fatherless children, our dear husbands and tender fathers having been so treacherously butchered, our estates sold from us, our inheritances cut off by the severe sentences of Lord Judge Jeffreys, now in the Tower of London, a prisoner," etc., asking that the Lord Chancellor, the vilest of men, be brought down to their counties where "we the good women of the West shall be glad to see him, and give him another manner of welcome than he had there three years since."

A little later on, upon the establishment of the Constitutional Government under William and Mary, it was found necessary to make a complete sweep in the Court of Chancery, the Court of Kings, the Court of Common Pleas and the Court of Exchequer. During a period of but twenty years there had been not less than eleven different Chief Justices of the Court of Kings Bench alone.

Let me give you a short description of one of these old time trials as an interesting contrast to our present day court scenes. I refer to the trial of Deacon Brodie, taken from Gray's "Some Old Scot Judges." The wicked Braxfield had just taken his seat as Lord Justice-Clerk, and played the principal judicial part in this trial. Lord Campbell speaks of both of these judges, Jeffreys and

Braxfield, as "monsters, who, disguised as judges, shed innocent blood and conspired with tyrants to overturn the free institutions which should have distinguished our country." Lord Chief Justice Cockburn took the position that the Scotch judge was a shade better than the English judge because he was a sound and able lawyer and Jeffreys was not, and then proceeds to eulogise Lord Braxfield as follows:

"He was unscrupulous, tyrannical, coarse, dissipated, illiterate. He had a hard heart, a tainted mind, a cross-grained, domineering nature, an uncouth exterior, without faith, without hope, without charity. He moved only in a world of sordid interests and ignoble purposes."

Gray says that the trial of the notorious Deacon Brodie—general counsellor by day and burglar by night—was well fitted to call forth all of Braxfield's sinister powers, and he made the most of his opportunities. Four judges sat on the bench beside him, but he controlled the case. John Clerk (afterwards Lord Eldon) was counsel for George Smith, one of Brodie's confederates, and with this young and brilliant advocate Braxfield had several encounters. Clerk was rash and pugnacious, and just the type of man to ruffle the not too equable temper of the Lord Justice-Clerk. In the first encounter Clerk did not figure well. In language not very respectful he charged the Court with admitting improper evidence. He was, of course, reproved, but persisted in impugning the judgment of the Court and in asserting that the jury were to judge of the

law as well as the facts. "Sir, I tell you," exclaimed the infuriated Braxfield, "that the jury have nothing to do with the law but to take it *simpliciter* from me." "That I deny," was Clerk's insolent answer. The Court was indignant, but Clerk held his ground and once more affirmed that the jurors were judges of the whole case. "You are talking nonsense, sir," roared Braxfield. "My lord, you had better not snub me in this way," was the instant reply, whereupon his lordship merely said, "Proceed—gang on, sir."

Mr. Clerk: "Gentlemen of the jury, I was just saying to you, when this outbreak on the Bench occurred, that you were the judges of the law and of the facts in this case."

Braxfield: "We cannot tolerate this, sir. It is an indignity to this High Court—a very gross indignity, deserving of the severest reprobation."

But Clerk would either address the jury in his own way, or not speak at all. Whereupon the Lord Justice-Clerk called upon the counsel for Brodie to proceed with his address; but the latter shook his head. The climax had now been reached. Braxfield was about to charge the jury when Clerk, starting to his feet and shaking a defiant fist at the Bench, shouted, "Hang my client if you dare, my lord, without hearing me in his defense!"

These words produced a great sensation, and the judges immediately retired to hold a consultation. On returning to the court, Lord Braxfield requested Clerk to resume his speech, which he did without further interruption. There was a conviction, and Braxfield's address to the prisoners

in passing sentence of death revealed the essence of his character. He was surely the last man in the world to reprove the vices of the age, or to point to the consolations of religion, but this he did in the case of Deacon Brodie in these hypocritical words:

“It is much to be lamented that those vices, which are called gentlemanly vices, are so favorably looked upon in the present age. They have been the source of your ruin; and, whatever may be thought of them, they are such as assuredly lead to ruin. I hope you will improve the short time which you have now to live by reflecting upon your past conduct, and endeavoring to procure, by a sincere repentance, forgiveness for your many crimes. God always listens to those who seek Him with sincerity.”

It is interesting to contrast the conduct of such a judge as Braxfield with that of another Scotchman who made quite a different name for himself after he had gained distinction in England and had been elevated to the Bench. I refer to Lord Chief Justice Mansfield: “The oracle of law, the standard of eloquence, the parent of virtue both in public and private life.” Professor Story says that both England and America, indeed the civilized world, lie under the deepest obligation to him. He proceeds:

“Wherever commerce shall extend its social influences, wherever justice shall be administered by enlightened and liberal rules, wherever contracts shall be expounded upon the eternal principle of right and wrong, wherever moral delicacy and judicial refinement shall be imbued into the

mercantile code, at once persuading men to be honest and to keep them so, wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter in which meanness and avarice and fraud strive for the mastery over ignorance, credulity and folly, the name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge."

From the middle of the sixteenth to the middle of the eighteenth century there were few public men of much note in England who, in the course of their lives, had not been sent as prisoners to the Tower of London. Sir Edward Coke, afterwards Chief Justice of Common Pleas, was one of these unfortunates. He was lodged in a lower room which had once been used as a kitchen in the Tower, and he had made so many enemies that when he arrived he found written on the door by some wag: "This room has long wanted a cook." It was Coke who wrote the "Commentaries on Littleton," which may be said to contain the whole common law of England as it then existed, for a profound knowledge of which he stood unrivaled. As Attorney General, however, he became utterly reckless of public liberty, and the "arrogance of his demeanor to all mankind was unparalleled."

When he was appointed judge, his manner became more bland. He listened with patience to the most tedious arguments and, in passing sentence on those who were convicted, he showed more tenderness for them after conviction than he had previously shown to prisoners whom he had prose-

cuted and while they were presumed to be innocent. Coke belonged to an age of gigantic intellects and gigantic attainments. It is said he had not the amiable qualities of his rival, Lord Bacon, nor his stupendous genius and brilliant literary attainments, for Coke knew hardly anything beyond the learning of his own profession. He shunned the society of Shakespeare and Ben Jonson as "vagrants" who "ought to be set in the stocks or whipped at the post."

"The jewel of his mind was put in a fair case. A beautiful body with comely countenance; a case which he did wipe and keep clean, delighting in good clothes, well-worn, being wont to say 'the outward neatness of our bodies might be a monitor of purity to our souls.'"

He had a great aversion to doctors and physic, and, until a horse fell on him in his eightieth year, he asserted that he never had had any dealings with doctors, and had always given God solemn thanks that he had never given up his "body to physic, his heart to cruelty or his hand to corruption." After his accident some of his warmest friends, in much alarm, sent three doctors to him, who were immediately dismissed from his presence with the accompanying remark, "that he had never taken physic since he was born, but that he now realized he at last had upon him a disease that not all the drugs of Asia, all the gold of Africa, nor all the doctors of Europe could cure—old age!"

In common with many of the other English judges, during the reign of Charles II, even Chief Justice Bacon served his term in the Tower of London for bribery. Chief Justice

Matthew Hale carried his aversion to bribery and corruption to an extreme. Burnet tells a story of a noble duke who once called on Lord Chief Baron Hale under pretext of giving him information that would better enable him to understand a case shortly to be tried before him. The Lord Chief Justice answering him said: "Your grace does not deal fairly to come to my chamber about such an affair, for I never receive any information of causes but in open court where both parties are to be heard alike."

The duke withdrew and was rash enough to go straightway to the king to complain of this as a rudeness not to be endured. His Majesty, Charles II, answered: "Your grace may well content yourself that it is no worse, for I thoroughly believe he would have used myself no better if I had gone to solicit him in any of my own causes."

Frederick Smyth was born in Galway, Ireland, in 1832. His father was High Sheriff of Galway for many years, but in consequence of the financial misfortunes of his father, he left his home town and landed in this country. A boy without money, without the rights of citizenship, without friends or connections, within a short period of time he worked his way to a high position at the Bar and afterwards filled one of the most honored places on the Bench for many years.

He first worked in the law office of John McKeon as errand boy, then as clerk, and in 1855 was admitted to the Bar. When McKeon was appointed United States District Attorney he took young Smyth along with him, and after

returning to general law practice made him his partner. Smyth's friend, John Kelly, then leader of Tammany Hall, nominated him for important offices on three different occasions only to meet with defeat at the polls. But in 1879, when Recorder Hackett died, the Board of Aldermen chose Smyth to fill out his unexpired term, and the following year he was elected Recorder at the polls for a full term of fourteen years. His career has been many times cited as an illustration of the possibilities in this country for men of progressive spirit. He made plans years ahead, saw them defeated and torn to pieces, but immediately began to build again on new lines.

He had a large, almost massive, frame, broad shoulders surmounted by a wonderful head, shapely and covered with sandy hair. His prominent nose, large mouth and broad, firm jaw cast in a classic mould, together with his grim, sallow visage, gave him a countenance one could never forget. As he sat robed on the Bench, he impressed one as a veritable sphinx—impassive, stern and uncompromising.

He established a reputation as one of the leading criminal jurists of the country. It is said that he pronounced the death sentence more times than any judge who ever preceded him in his office as Recorder. He was noted for the extreme sentences he accorded to hardened criminals, and the law-breaking classes deemed him a most severe judge. It is safe to say that no man who ever sat on the Bench in this city was more of a terror to the criminal classes. During his fifteen years as Recorder he had before



RECORDER FREDERICK SMYTH

him more noted criminals than all his colleagues combined. Practically all of the most important cases during a long period of years were tried in his court, with extremely few reversals by the appellate courts.

Tom Nolan, a picturesque Irish wit who occasionally appeared for prisoners in the Sessions Courts, on one occasion was giving me his views about some of the judges and lawyers. "There's Smyth," said Nolan; "he's a good judge, a foine judge, but he thinks ivery man ought to go to prison at least wance." And yet no man ever did more acts of kindness with greater willingness and enthusiasm, for beneath his harsh exterior was a warm, sympathetic heart. He seemed to make it a cardinal principle that the beneficiary should never become aware of his generosity. Many of us have seen him, after he had imposed some severe sentence from a sense of duty, take an old wallet from his pocket and surreptitiously hand a substantial bank note to one of his court officers as an anonymous gift to the wife or mother who had pleaded with him for mercy in vain, but to whom his heart went out in sympathy.

It is said of Mr. Justice Hawkins, who held a position among English judges quite analogous to that of Recorder Smyth, that early in a case he made up his mind whether the accused was innocent or guilty and thereafter became the partisan seeking a verdict instead of a judge holding evenly the scale of justice, and some of his charges to the jury have been described as "brilliant speeches for the prosecution." When Judge Hawkins was sure of his prey, he

was all wreathed in smiles, for he believed that his mission on earth was to see that the guilty did not escape. With Recorder Smyth, however, whatever his opinion of the guilt of the prisoner on trial before him, he always seemed to take particular pains not to exhibit his own views to the jury. Sir Henry Hawkins was always described as "The Hanging Judge," and yet he, like the Recorder, was one of the kindest of men. He was on the Bench for twenty-two years, and is often spoken of as one of the strongest, fairest and most upright of judges.

I am afraid candor compels me to say that the dear old Recorder's fairness toward those he felt were guilty was something like that of Lord Chief Justice Campbell, whose politeness to the prisoner in the dock was amusingly illustrated by a remark made by the Crier of the Court to a friend at the commencement of the trial of William Palmer in one of the most celebrated poison cases ever tried in England. His Lordship had said with great suavity of manner, "Let the prisoner be accommodated with a chair."—"He means to hang him!" said the crier.

Recorder Smyth had a fatherly, benign way of passing sentence. When he meant to send a man to Sing Sing for an exceedingly long term it seemed as if he tried to mitigate the sentence by breaking it to the prisoner in a kindly manner. This the criminal often misunderstood, thinking he was going to escape easily, but his surprise and chagrin were great when the address ended. The Recorder always presented a singularly calm and equable appearance on the

Bench; I never saw him yield to irritability or exhibit the slightest impatience. Sound law and substantial justice were characteristic of his every ruling. When the jury failed to convict in cases of undoubted guilt, the Recorder would bend his shaggy brows sternly upon the jurymen and say: "You are discharged, but *not* with the thanks of the court."

During the last four years that he was Recorder I was constantly in his court. It was at a time when there was an unprecedented succession of serious, unusual crimes, all of which were tried before him. These included the celebrated poisoning cases of Carlyle W. Harris, Dr. Robert W. Buchanan, and Dr. Henry C. F. Meyer; and the trials of Ben Ali, "the American Jack the Ripper;" Frank "Biff" Ellison, the popular clubman who shot down in the street the father of the girl he hoped to marry; Charles W. Gardner, one of the agents of the Society for the Prevention of Crime, whose conviction brought down upon the Recorder's head the wrath of the Rev. Dr. Parkhurst and his followers—and many others. Many of these trials lasted from three to five weeks. In each I appeared personally for the prosecution and was thus afforded a most unusual opportunity to become intimately acquainted with the mind, habits, character and great heart of this remarkable man.

He knew no leisure moments except during the deliberation of his juries. He never took more than thirty minutes recess in the middle of the day, when he would retire to his chambers and regale himself on a raw apple and a glass of

water. The courtrooms in the old Brownstone Court House were a constant menace to health. Words cannot convey an impression of their poisonous atmosphere. One came to the conclusion that the reason the Recorder ate so little was because his body must be feeding on the fattened microbes of his courtroom! He remarked once that architects who design courtrooms not only provide against the escape of criminals but also against the escape of foul air. He was constantly seen disinfecting himself while on the Bench by sniffing camphor. Said he, "I couldn't exist without inhaling something to counteract the foul air." And yet he never seemed to become ill. Like Mr. Justice Hawkins, he would sit for a dozen hours in his stuffy little courtroom, packed to the doors, with every window tightly shut. Each time one of the audience would leave the courtroom for air there were usually fifty or more waiting in the corridors for an opportunity to squeeze by the officer at the door and take the vacant seat in the fetid atmosphere.

In London the barristers who had to practice in Judge Hawkins' court, in their wigs and gowns were intense sufferers, especially in summer. And after Hawkins' death, his body having been cremated, they spread the story that, as his body was being pushed into the retort the old judge was heard to murmur, "Please close that door—I feel a draft." Yet few knew that Judge Hawkins used to take his dog out each day for a five mile walk before breakfast and before opening court,—nor that Recorder Smyth did much the same thing *minus* the dog.

Judge Hawkins retired from the Bench at the age of eighty-one, in full possession of his faculties, and a year later Queen Victoria bestowed a peerage on him. He did not die until his ninetieth year,—which may be food for thought for some of our modern physicians who have become more or less microbe and fresh air cranks. Recorder Smyth, to be sure, died at sixty-eight, but of pneumonia, and nearly all of us who practiced in those courts are still alive and going strong.

While the jury was deliberating upstairs, the Recorder used to invite us into his chambers to await the verdict, sometimes until midnight, and at such times the stern judge melted into the most pleasant and genial of men.

Though the Recorder undoubtedly was a stern, uncompromising judge to the guilty, he was equally a defender of those he believed innocent. During my own long years of experience in his court I never saw but one guilty man escape, and I am certain I never saw an innocent one convicted. I remember an amusing story illustrative of his desire to protect the innocent. In a murder case where the evidence was so palpably insufficient that he felt obliged to stop the trial and direct the jury to acquit the prisoner, a fairly well known lawyer, who desired to do something to justify the fee he had received from his client, claimed the privilege of addressing the Court. "We'll hear you with much pleasure, Mr. B—," said the Recorder, with that benign smile of his, "but, *to prevent accidents*, perhaps we had better first acquit the prisoner!"

It was always claimed by the Recorder that the Carlyle Harris case was not only the most interesting but the most important one that was tried before him during his fifteen years in the criminal courts. The trial took place in 1891, more than thirty years ago, during which time it has almost gone out of mind, but at that time it was considered the most sensational case that New York had ever known. It was literally the talk of the town, and people were quite evenly divided in their opinion as to the guilt of the accused.

At the time he was arrested and indicted, Harris was a young medical student just graduating from the College of Physicians and Surgeons in this city. He was of excellent family, his grandfather being one of the leading local surgeons. The evidence against him was very fragmentary up to the time when he presented himself at the District Attorney's office, just as so many other culprits have done, and, protesting his innocence, offered to assist in unraveling the murder, if it turned out that any crime had been committed. He was a handsome chap, cool and self-possessed, but his attitude was gratuitously frank, and his visit resulted directly in a thorough investigation of all the circumstances surrounding the sudden death of his young wife, which ultimately led to his indictment.

Harris was twenty-three years old at the time of his trial. Two years before, at a dance in a hotel at Ocean Grove, he was introduced to a Miss Helen Potts, then a great favorite in Ocean Grove society. She was in her eighteenth year, pretty, intelligent and talented. Eighteen months after this

introduction she suddenly died at Miss Comstock's boarding school in this city. Meanwhile, the acquaintance begun at Ocean Grove had developed into friendship, then into intimacy, a secret marriage, an abortion and premature child birth, and it ended in her sudden death by poison.

On the evening before her death she was with the principal of the school in the sitting room, reading, in perfect health and cheerful spirits. She retired about ten o'clock. It so happened that her room-mates had gone to a concert, returning at about 10:30. It was their return which awakened Miss Potts, and enabled them to supply some of the most essential evidence in the case. Helen complained of a choking sensation, of not being able to swallow, of feeling numb and of fearing that she was going to die. She also spoke of her pleasant symptoms, and of having had "such lovely dreams that she wished they would go on forever." Her fellow students a little later were awakened by her moans. They quickly summoned the school principal, Miss Day, and also a physician by the name of Dr. Fowler. By this time she was in a state of profound coma, and although two physicians worked over her all night she stopped breathing at sunrise.

It appeared at the trial that Harris had asked Helen's mother to allow them to be engaged, and after this was refused, he obtained permission to take her for a visit to the New York Stock Exchange. They went instead to the City Hall and were secretly married under assumed names. A few months after this Helen was taken seriously ill while on

a visit to her uncle, a country doctor, who immediately discovered that the cause of her sickness was an unsuccessful attempt on the part of Harris—made under the most shocking circumstances—to perform an abortion on her. The ensuing medical treatment naturally made it necessary to summon the mother and inform her of the secret marriage.

For the following six months Harris' one effort seemed to be to prevent his wife's mother from making the marriage public. But when the mother ultimately insisted that a date be fixed when the marriage should be properly solemnized in church, Harris agreed—"provided no other way can be found of satisfying your scruples," as he wrote her. Evidently he then made up his mind to end his wife's life. The following day we find him applying to a chemist for six capsules of quinine, four grains in each, and each containing in addition an eighth of a grain of morphine. Four of these capsules he gave to Helen with the suggestion that she take one each night as a cure for the headaches of which she had complained. He then went immediately to Old Point Comfort. Hearing from Helen by letter that she had taken three capsules without any effect, he wrote her to continue taking them. The afternoon she received this advice she showed her mother his letter and the box containing the remaining capsule and wanted to throw it out of the window. The tragedy of it was that her own mother persuaded her to take the fatal capsule, "as Carlyle had recommended it." That night she fell into the coma from which she never awoke.

It was the claim of the prosecution that when Harris received these capsules, which had been properly compounded by the chemist, he unloaded one and substituted four grains of morphine in place of the quinine. His directions were that one was to be taken each night, and it was because he could not know which night she would take the fatal dose that he absented himself from the city.

The body had been embalmed and it was fully six weeks after the burial that Dr. Allen McLean Hamilton was requested to disinter the body and make a chemical examination. Dr. Hamilton told me that it was the most pitiful sight he had ever seen as they lifted the lid of the coffin. Here was this lovely girl, nineteen years old, dressed all in white, absolutely preserved, and lying there looking like a young bride asleep. The contents of her stomach and intestines disclosed a minute quantity of morphine, but no quinine, whereas quinine was shown to be as stable as morphine, so that it should have been found if taken recently in similar quantity. The deceased had lived for twelve hours after taking the fatal capsule, and, as morphine is very rapidly absorbed by the body, the finding of any morphine at all in the stomach proved that an excessive dose of the drug had been taken—a minimum of from three to four grains.

The trial lasted for over three weeks. Every incident and fact, of greater or less significance, gradually formed an invincible chain of circumstantial evidence showing that Harris had poisoned his wife, there being no other way to

rid himself of her. The conclusion was inevitable. Unable to gratify his passion for her except by making her his wife, he persuaded her to a secret marriage under assumed names. He soon tired of her, and endeavored unsuccessfully to remove the fruit of their marriage. He had even formed an illicit connection with another woman to whom, with more or less seriousness, he proposed a scheme for their enrichment by her marriage to an old man whom he, Harris, could easily rid her of "with a pill that he knew about." He forbade his wife to tell of the marriage; he manifested great anger when a friend of hers, to whom she told the secret, protested that the mother should be informed. On this occasion Harris exclaimed that he wished his wife were dead, and said he would rather kill her and himself than have the marriage made public. When the mother learned of the marriage and pressed for a public ceremony, he put off its announcement on various pretexts, first persuading her to place her daughter at a boarding school. Finally, when the mother insisted upon a clerical ceremony on the anniversary of the secret marriage, while pretending to consent, he immediately prescribed a remedy of quinine and morphine to which he added a lethal dose, and at once absented himself from the state.

The motive for the crime appeared to be the fear that publicity of the marriage would inculcate him as a bigamist because of a previous secret marriage, of which there was some evidence, and would likewise put an end to his apparently successful career of ruining young girls. Perhaps

most of all he feared the social and professional, even legal, consequences to himself if his dastardly criminal operation should come to light.

The defence was conducted by Mr. John A. Taylor, Mr. William Travers Jerome and Mr. Charles E. Davison. Mr. Taylor was at that time a lawyer of some prominence, and was president of a leading literary society, but he had no conception whatever of the proper conduct of a criminal case. It would have been far better for Harris had his fate lain entirely in the hands of Mr. Jerome, who, at that time, had only recently been an Assistant District Attorney and knew every nook and corner of a murder trial, to which Mr. Taylor was being introduced for the first time in his professional experience.

When the jury brought in its verdict of murder in the first degree it was midnight. A great crowd had collected in the courtroom and, when Harris' mother shrieked and fell on the floor in a faint, even the dear old Recorder, hardened as he was to such scenes, bowed his head.

Following quickly on the footsteps of the Harris conviction, the District Attorney brought to trial before the Recorder another physician charged with poisoning his wife, one Robert W. Buchanan. Dr. Buchanan was skillfully defended by such expert criminal lawyers as Charles W. Brooke and Dr. William J. O'Sullivan, the latter especially engaged to conduct the medical part of the case. Again the evidence upon which the defendant was convicted was wholly circumstantial, but all the surrounding circumstances, when

supplemented by his own incriminating acts and statements, pointed clearly to his guilt.

At the time of the tragedy the prisoner was a practising physician, living with his wife. The wife had been in perfect health for the previous fourteen years, when suddenly one morning in April, 1892, after eating her usual breakfast, she was taken ill and complained of severe pains in her head and an inability to stand on her feet. A doctor was summoned who diagnosed the case as mere hysteria. An hour later the prisoner was seen at his wife's bedside giving her two teaspoonfuls of some sort of medicine. She at once reached for an orange and bit into it, "as though to relieve a bitterness of taste" (such as morphine produces), and in ten or fifteen minutes she fell into a deep sleep from which she never awoke.

Forty-two days after her death her body was exhumed and the autopsy failed to reveal a natural cause of death, but upon an examination of the stomach and intestines they were found to contain minute quantities of morphine and also traces of atropine (belladonna). This testimony occasioned a genuine battle of experts, which lasted five weeks, the claim of the defence being that ptomaines in bodies in the course of putrefaction, forty-two days after death, could not be distinguished from morphine by chemical analysis.

In 1890 Dr. Buchanan had become acquainted with a rich woman in Newark by the name of Anna Sutherland, whom he treated professionally. She was then twenty

years his senior. He claimed that she had fallen in love with him and had made a will in his favor and had deeded him all her real estate. Three days later he married her. Like Harris, he attempted to conceal the fact of the marriage. For a long time he denied it to his friends, claiming that she was only his housekeeper, who was always importuning him to marry her, but that marriage with her, he felt, would ruin him as a doctor. They soon became wearied of each other, she resenting his neglect, and toward the end of 1891 she wanted her property back, threatening to leave him. He complained to one of his friends of the position that he had found himself in, saying that he had made up his mind to get rid of her no matter what it cost, even if he had to leave the country. He claimed that his wife had threatened to poison herself, and that he told her she knew where he kept the poison and to help herself.

Although the attending physician had diagnosed the case merely as one of hysteria, Buchanan told a friend of his at noon the same day that he considered his wife was getting worse and that he was sure she would not live twenty-four hours. To other friends later in the afternoon he spoke of his wife as about to die, saying that "it looked as though Providence were smiling on him;" that "evidently she was going to quickly step out," and relieve him of all his troubles. Upon returning from the funeral, one of his friends remarked that he seemed to feel pretty jolly over it and he replied, "These things cannot be helped; we all have to die." A few days later Buchanan went to Nova Scotia, and within

three weeks of his wife's death he had remarried his first wife, from whom he had been divorced, and they both returned to New York City.

When he found that he was suspected of the murder, he fell into the same error that Harris had done and began to talk. He spoke to some of his friends about going away "until the thing blew over," and manifested the utmost uneasiness about the investigation, especially the exhumation of his wife's body. He even made preparations to leave the city under an assumed name, and arranged a telegraphic code with a friend, who was to acquaint him with what transpired after the grave was opened. He sought a residence for himself and wife, under assumed names, in an obscure part of the city, and began to spread the report that his deceased wife had been a morphine eater and that morphine would surely be found in her body, and that his fear was that, coming so soon after the Carlyle Harris conviction, he would be arrested and put on trial for his life. On one occasion he confided to a friend that he was quite sure his wife had died of an overdose of morphine, and that she was also in the habit of taking belladonna, which would neutralize the usual pathological effects of morphine. He consulted a lawyer about extradition treaties, and to others he expressed the wish that he had had his wife's body cremated.

At the trial Buchanan made the fatal mistake of taking the stand in his own behalf, and under cross-examination he involved himself in a maze of statements of so untruthful and incredible a nature as to justify any jury in discrediting

him as a witness, especially since his statements were in conflict with those of other witnesses. It was his performance in his own behalf, when subjected to a two day cross-examination, that had great weight with the Court of Appeals in unanimously sustaining his conviction, even though the jury had found it necessary to deliberate for nearly thirty-six hours before rendering a verdict of guilty. I have always felt that, had both Harris and Buchanan been able to refrain from talking about their victims and had been content to sit still and say and do nothing, neither of them could have been convicted.

After their cases had been thoroughly reviewed by the Court of Appeals both of these men were duly executed. Harris insisted upon his innocence even up to the last moment and while sitting in the electric chair. So also did the famous English poisoner, Dr. William Palmer, but Palmer, as the black cap was being pulled over his head and the priest was pronouncing the Benediction, admitted his guilt the moment before he swung to his death.

"May God strike me dead if I did!" cried a prisoner when the jury had found him guilty. There was a pause and then the judge in slow, measured tones said, "Prisoner at the Bar, Providence not having seen fit to interpose in your case, it is my duty to impose upon you the sentence of the law, that you be hanged by the neck until you are dead."

Shortly after the Harris and Buchanan convictions came still a third poison case, making three in quick succession, although there had not been a similar case in this state in

thirty-two years. Dr. Meyer poisoned a young relative for the sole purpose of obtaining the life insurance that had been taken out in his favor. It was a very long trial, and the facts are too sordid to be of much interest after this lapse of time.

The trial of Ben Ali, the "American Jack the Ripper," however, caused such a sensation in the Recorder's courtroom that no mention of his career on the Bench would be complete without some reference to it. Many may remember the atrocious murders that occurred some thirty years ago in London, when every few weeks some woman of the town would be found dead, first in one section of the city, then in another, her body mutilated in exactly the same fashion in each case. It came to be regarded as a Jekyll and Hyde mystery, or else the work of a religious fanatic. Scotland Yard was helpless to unravel the mystery and the murderer became known to the public simply as "Jack the Ripper." Thomas Byrnes, at that time the Chief Detective in our Police Department,—and a really great detective he was,—publicly proclaimed that if any such crime were committed in this city he would have the murderer under lock and key inside of a week's time.

One morning an old woman by the name of Shakespeare was found dead in her room at one of the so-called Raines Law Hotels, with her body mutilated in exactly the method adopted by the London "Jack the Ripper." Here was an opportunity for Byrnes to make good his boast, and sure enough, within the week, one Ben Ali, a Greek, had been

arrested and was subsequently indicted and tried before Recorder Smyth.

The Greek had occupied a room but a few doors from the one the Shakespeare woman had slept in, and traces of bloody hands were discovered along the walls leading from one room to the other. Immediately after the prisoner was arrested he was stripped of his clothes, and even the parings under his nails were carefully preserved. Under chemical analysis the blood stains on the woman's underclothes were shown to contain also the contents of the small intestines, which could be reached in no other possible way than by an abdominal incision such as her body disclosed.

By tracing the movements of the woman the evening before her murder, Byrnes obtained a list of the things she had eaten at midnight. Without disclosing this fact, we sent Ben Ali's blood-stained clothes, the woman's underclothes, and the finger nail parings taken from the prisoner to the most noted toxicologist in Philadelphia. To our amazement, a few days thereafter, we received a report that all the blood specimens contained partially digested substances that could come only from the small intestines, *enumerating the very foods that it had been discovered the deceased had eaten the night before*,—cabbage or coldslaw, cheese and the like. Even the nail parings contained the same substances.

The trial was the most dramatic I ever witnessed. His lawyers allowed the prisoner to take the witness stand in his own defence. Picture this enormous Greek, with his

fiendish face, drawing himself to his full height within a few feet of the foreman of the jury, brandishing high in air the bloody knife with which he had mutilated his victim, and swearing by Allah that he was innocent! It seemed for a moment as if he might annihilate every man that had anything to do with the trial before any one could hold him.

The evidence was purely circumstantial. It was shown that the prisoner consorted with women of the street, but there was not the slightest suggestion by any one that he had ever known or even met the woman he killed. Nor was any motive for the crime shown, unless it was rage at the repulse of his advances. He presented a pitiable spectacle as he sat by his counsel during the long trial, unable to understand a word of what was going on excepting when questioned through an interpreter. Partly on that account and partly because there was some doubt as to his sanity, the verdict was one of imprisonment for life rather than the electric chair. A year or so later I heard he had been transferred from prison to the asylum for the criminal insane.

After the jury had retired to consider their verdict I never saw a man in such a state of excitement as the usually self-possessed, placid Tom Byrnes. He was staking his reputation against Scotland Yard, and he would consider a conviction one of the triumphs of his life. The jury retired at eight o'clock at night and by eleven they had not yet agreed. Byrnes was on pins and needles. He kept running after me all over the court house, up and down stairs, in his attempt to find out from me if I knew how the jury stood.

In those days the partitions in the jury room were very thin and the court officers could hear pretty much everything that was going on. If the court officer happened to like the Assistant District Attorney in charge of the case, he soon knew as much about the jury's deliberations as the court officer did. Finally I simply *had* to tell Byrnes that the jury stood eleven to one for convicting, but that a grocer, the juror occupying the twelfth seat, was holding out for acquittal. Byrnes swore a mighty oath that if that scoundrel spoiled the verdict, he would "have his place burglarized inside of forty-eight hours!"—and he no doubt could have done that very thing. In those days the detective department was in very close touch with many of the smartest crooks in town, who acted as "stool pigeons" for the police and helped them unravel many a mysterious crime such as nowadays goes unsolved. The grocer's household was safe, however, for a verdict of guilty was reached about midnight, and Byrnes had triumphed over Scotland Yard.

Scotland Yard has earned the reputation of being the most perfect organization of its kind in the world and is one of the best known of British institutions. In his book, from which I have already quoted,* Charles Kingston speaks of one of its Chief Inspectors, John Kane, in a way that leads me to think that Kane and Tom Byrnes, both Irishmen, must have been fashioned in much the same mould. Kingston speaks of the former as a type which never finds its way on to the stage or into a novel. Both

* "Dramatic Days at the Old Bailey."

men were reserved in manner, possessed of a very meagre sense of humor and passionately devoted to their profession. Kane never took a real holiday during the forty years he was in the police force, and I doubt if Byrnes did.

It was Kane who was chosen by King Edward, from amongst the leading men at Scotland Yard, to proceed to Dublin to investigate the mystery of the loss of the Crown jewels. It is said that he was chosen not only because he was an Irishman, but because he was known never to use two words where one would suffice. Dublin Castle was then the Scotland Yard of Ireland, and yet a safe in an inner office had been opened and the priceless jewels carried off. The very audacity of the theft was the chief reason for the immunity of the thieves. Kane was not successful in unravelling the mystery, but Kingston narrates a later case which was successfully handled in the real, old fashioned Tom Byrnes style.

“Towards the close of his career he had an encounter with a very pretty woman, the wife of an officer in the Indian Army, which he never forgot because it convinced him that, had he failed to arrest her then, she would have progressed in crime until she had become the most dangerous female swindler in Great Britain. By raising the rank of her husband from captain, which he actually was, to general, she obtained a furnished flat in the West End at a rental which she could not possibly have paid, but once she was installed at a fashionable address it was easy enough not only to obtain expensive clothes and even jewelry on

credit, but to get regular supplies of food. But when she took to cashing checks drawn on a bank where she had never had an account, Scotland Yard got to hear of her existence, and Chief Inspector John Kane went to investigate.

“‘There must be someone impersonating me,’ she said, at their first interview, ‘I have heard something of what you have told me. But you will agree with me that it is not likely that the wife of a general in the army could be capable of such mean frauds?’

“Kane discreetly evaded answering the question, and went off professing himself satisfied, but he had only called to make the personal acquaintance of the lady, so that if ever he had legal evidence that she was guilty of the alleged swindles he might take the right person into custody.

“There was no doubt that she was a lady in the usual and accepted sense of the word, and that her husband was an officer in the Indian Army. Furthermore, she had relatives occupying high positions in the Civil Service, and one of her uncles was governor of a colony. Kane was aware of all this and it behoved him, therefore, not to jump hastily to conclusions and also to be wary to distinguish between debts which could only be made the subject of civil action and debts so incurred that a criminal court could deal with them. With his usual foresight and dogged thoroughness he collected the evidence, and, having satisfied himself that the woman was a very dangerous swindler, he presented himself for the second time at the luxuriously furnished flat. The door was opened by a neatly dressed maid whose highly

coloured cheeks were in strong contrast to the pale beauty of her mistress, though as the hall of the flat was not lighted it was difficult to see her features.

“‘My mistress is in her bedroom, sir,’ said the maid, when Kane requested to be shown into her presence; ‘If you will wait a minute in the drawing-room she will come to you.’

“‘Thank you,’ answered the detective, turning in the direction of the door on the left which the girl had thrown open. He was not in the least perturbed at the prospect of having to wait, and neither did he anticipate the lady escaping his clutches, for he had, of course, taken the elementary precaution of stationing colleagues at the back and front of the block of flats. The maid stood aside to permit him to enter, but to her amazement he caught her by the arm.

“‘You are the person I want,’ he said, quietly.

“‘How did you know I had changed clothes with my maid?’ she said, unable to restrain her curiosity when at the police station she was informed that she was to be kept in a cell until brought up before a magistrate.

“‘Your disguise was a pretty good one,’ said Kane, gravely, ‘but when you made the exchange you forgot to remove two valuable diamond rings from your fingers, and they gave you away. Domestic servants don’t as a rule sport rings worth ten years’ wages.’

“The ingenious lady was convicted and sent to prison, and did not profit by her punishment, for her name cropped up more than once in the police courts during the war.”

The disclosures of the Lexow Committee in their investigation of the Police Department conducted by John W. Goff—together with the influence of Dr. Parkhurst after the conviction before Recorder Smyth of his henchman, Gardner, who had been defended by Goff,—made Mr. Goff the logical candidate for the office of Recorder on a reform ticket against Tammany Hall, and at the expiration of his term in 1894 Goff defeated Recorder Smyth at the polls.

However, within the year Smyth was nominated and elected to the Supreme Court Bench, where he served with marked ability until he died six years later, at the age of sixty-eight. Justice Smyth's deep devotion to study was believed by his physicians to have been responsible for his illness. He is said to have devoted eighteen hours at a time to the consideration of legal papers, and he slept but little. It was with the utmost difficulty that he was once persuaded to revisit his native land, and he seemed to begrudge the time he spent on that vacation. He loved the City of New York. Even in mid-summer it was his pleasure to stay here. He cared for neither mountains nor sea. He used to say that he came here a poor boy, that here fortune had smiled upon him, that to this community he was indebted for his money, honors and dignities, and that he loved our streets and parks and even our rows of ugly brownstone houses better than he loved any of the sights of nature.

Smyth had many friends and admirers among the prominent men of his time. Frederick R. Coudert regarded him as "the greatest criminal judge in the world." Ex-Chief

Judge Noah Davis called him "a blessing to this city." It will be many, many years before the name of Recorder Smyth is forgotten in this community as a judicial champion of law and order, while his memory will ever live in the hearts of his friends who admired his Spartan virtues and loved his sympathetic soul. "To live in hearts we leave behind is not to die."

Much has been written about the so-called "convicting judges." It is a pleasure, by way of contrast, to draw your attention to the gentler, milder mannered judge, the type of which Henry A. Gildersleeve affords a striking example. All who knew him have only the most affectionate memories of my friend, Judge Gildersleeve—"dear old Gildy," we used to call him,—who died recently in his eighty-third year. Judge Gildersleeve certainly could not be rated among the convicting judges, for I do not remember a single case during the many years he was on the criminal bench where he had to pronounce the death sentence. Perhaps he was not in a strictly legal sense a great judge. He had had comparatively little experience at the Bar in trial work before he was elected to the General Sessions Court.

He was known in his younger days as the crack rifle shot of the world. When he returned from Ireland, having won for the American rifle team, of which he was the captain, the championship of the world by the defeat of the celebrated Irish team before twenty thousand spectators, his steamer was met at Bowling Green upon his arrival by a host of his friends. Then he was marched up Broadway with a brass



MR. JUSTICE HENRY A. GILDERSLEEVE

band, much like a conquering hero. His great skill with the rifle, his management of the team abroad, his happy speeches made in the course of the trip, and the modesty with which he received the honors showered upon him, made a deep impression on New York. He was the hero of the hour. Perhaps it was this triumph more than anything else which made him a prolific vote getter and suggested him as a candidate for General Sessions Judge, to which office he was elected by a great majority in the autumn following his return from abroad.

Judge Gildersleeve's superb qualifications as a judge in the criminal courts consisted in his consummate fairness and his natural sense of justice and equity. It was inconceivable that an innocent man could ever be convicted in his court. In the fourteen years that he was judge of the Court of General Sessions he disposed of over fifteen thousand criminal cases and was reversed in only two instances. His judicial career continued for thirty-four years, the last twenty years as Judge of the Supreme Court, to which he was elected in 1891. The last twelve years of his life were spent as official referee. Thus, up to the time of his death at the age of eighty-three, he had given forty-six years of his life to public service in judicial work, one of the longest periods on record.

Judge Gildersleeve had a very uncommon common sense, which stood as a valuable offset to the more learned legal qualifications for the Bench. His unquestioned integrity and independence of all influences, his patience and courtesy,

brought him an unusual popularity at the Bar and inspired every suitor with confidence. He was a splendid physical type of manhood—even in old age having the figure of youth,—tall, erect, athletic, with the eye of the eagle and the strength of the woodsman, coupled with a wonderful vitality and power of endurance which often put his juniors to shame.

He was a shining example of my contention that men who have made conspicuous records at the Bar as trial lawyers do not always make the best judges. They form the habit of seeing only one side of a case—their own—which tends to unfit them for impartial judgment on the Bench. Speaking of Judge Gildersleeve's courtesy to the lawyers who appeared before him, Judge Horace Russell once told the following story at a dinner given in honor of Judge A. R. Lawrence:

The distinguished Mr. Thomas Nolan once had a client whose name was Mrs. Moriarity. After her case had been placed on the calendar, Mrs. Moriarity appeared every day in Nolan's office together with her *eleven* witnesses. The case finally reached the top of the calendar and Mr. Nolan was on hand to commence the trial. The opposing counsel asked for a postponement. Mr. Nolan fought the postponement with great eloquence, laying much stress upon the fact that Mrs. Moriarity had been put to the enormous trouble and expense of coming every day to his office with her eleven witnesses. Judge Gildersleeve, who was sitting, was not convinced apparently by Nolan's fervid oratory,

and felt obliged to grant the adjournment. Then the barrister arose. "Your Honor," said he, "has seen fit to grant a postponement of the case, and while I humbly submit to the ruling of the court, yet I would like to ask your Honor to do me a personal favor."

"Certainly, counsellor, with pleasure," replied Judge Gildersleeve. "What is it?"

"Go you to my office," thundered the barrister, "and inform Mrs. Moriarity that her case has been *postponed!*" *

When Randolph B. Martine became District Attorney on the 1st day of January, 1885, he was requested by Benjamin Wood, the owner of the *Daily News*, a very influential newspaper of that period, to appoint as one of his assistants ex-judge Gunning S. Bedford. Judge Bedford was a man of good family, but had held office during the Tweed regime and on that account had been temporarily under a cloud. He was about fifty years old, very short and slight, of extremely nervous temperament, and had a squeaky feminine voice. Mr. Martine usually assigned him to the prosecution of cases of rape or attempted rape. These cases were often defended by the great and only William F. Howe. The trials were highly diverting, chiefly because there was an understanding between Bedford and Howe that neither would interrupt the other when summing up to a jury, no matter what he said. As may be imagined, this led to a freedom of speech not usually permitted in our courts.

On one occasion Bedford was prosecuting and Howe was

* "The Barrister," by Stanbury.

defending a Russian charged with the crime of rape. Associated with Howe in the defence was a young countryman of the prisoner, recently admitted to practice. In urging the jury to convict, Bedford, uninterrupted by Howe according to agreement, launched out in his summing up somewhat in this style:

“Across the bosom of the broad Atlantic, gentlemen, there will be flashed tonight the grateful intelligence that at last an American jury has set the seal of its condemnation on this dreadful vice and the vagabond Russians by their camp fires will tremble* * *.”

As he uttered these words the young Russian attorney arose in protest and even made a pass at Bedford, which probably touched him lightly on the shoulder. As soon as the jury went out, Bedford, with great indignation, told another member of the staff what had happened. This associate pretended to be profoundly shocked by the attempted assault and immediately recognized in it an opportunity to stage a most amusing scene at the expense of the comical “little Gunny Bedford,” who would be sure to take the matter seriously. The associate prevailed upon him to seek out Judge Gildersleeve, who had tried the case and who was still holding court, and complain of the conduct of the defendant’s counsel with a demand that the court take cognizance of the matter. The judge, knowing Bedford and suspecting who had sent him on his errand, held an immediate investigation. Mr. Howe and his associates were summoned to the bar and Bedford opened the solemn pro-

ceedings. "If your Honor please, while engaged in the arduous performance of my duty as a public prosecutor I received from the counsel for the defendant a blow upon the back, the pain of which I still feel. I beg your Honor to believe that it is not on account of the injury done my person that I make this complaint, but because of the affront upon the administration of justice and the attack upon the dignity of the man who presides over the great office that I represent, the District Attorney, whom I love and respect."

Thereupon William F. Howe replied, "If your Honor please, I desire to have noted on the record that the counsel for the defense to whom the learned District Attorney has referred in the course of his remarks is not William F. Howe, for during an experience of thirty years at the bar I have never had to resort to personal violence to win my cases!" By this time the young Russian attorney, recognizing the serio-comic position he occupied, promptly confessed that it was he who had made a pass at the distinguished attorney Bedford, but he did not believe that he had even touched him. He stood at the bar trembling with fright as Judge Gildersleeve, with a great attempt at dignity (for it was difficult for him to suppress his merriment) rendered the following sentence: "Prisoner at the Bar, you have been found guilty of a very serious offense against the administration of justice. The task of the District Attorney is difficult enough as it is and he is certainly entitled to protection against everything in the nature of an assault upon his person while engaged in the arduous discharge of his duty.

The judgment of this court is that you be fined the sum of one dollar, and stand committed until the fine is paid!"

The eloquence of Assistant District Attorney Bedford on this occasion suggests the possibility of his having recently read the life of the Lord Keeper Kenyon, who was not only bombastic in his style but was capable of perpetrating some very ludicrous metaphors. He was once passing sentence on a dishonest butler who had been convicted of stealing large quantities of wine from his master's cellar. "Prisoner at the Bar," the judge is reported to have said, "you stand convicted on the most conclusive evidence of an inexpressible atrocity—a crime that defiles the sacred springs of domestic confidence and is calculated to strike alarm into the breast of every Englishman who invests largely in the choicer vintages of southern Europe. Like the serpent of old, you have stung the hand of your protector. Fortunate in having a generous employer, you might, without dishonesty, have continued to supply your wretched wife and children with the comforts of sufficient prosperity and even with some of the luxuries of affluence; but dead to every claim of natural affection, and blind to your own real interests, you burst through all the restraints of religion and morality and have for many years been *feathering your nest with your master's bottles.*"

I wish it were within the scope and limits of my subject to write about many more of the great judges who graced our Supreme Court in the old days and whose example and friendship meant so much to my professional life.



MR. JUSTICE GEORGE C. BARRETT

Judge George C. Barrett, whose judicial career began at the age of twenty-five, was conspicuous among these. He was elected Justice of the Sixth District Court of this city four years after his admission to the bar, and at the age of thirty-four he was elected a Justice of the Supreme Court, in which office he served the public with marked ability for upwards of thirty years. During his long period of service on the Bench Justice Barrett presided at many famous trials. When Richard Croker, the leader of Tammany Hall, was charged with having killed a man in an Election Day quarrel, he was tried and acquitted before Judge Barrett. The trial of Jacob Sharp for bribery in buying the votes of aldermen for the Broadway Street Railway franchise was also before Justice Barrett, as were all the "boodle Aldermen" cases. He was trial judge in the case of Ferdinand Ward, who wrecked the firm of Grant and Ward, in which General Grant, after his term as President had expired, was a partner.

Judge Barrett also achieved an enviable reputation as a man of letters. His literary talent so permeated his legal labors that he was famed not only for the force and clearness of his opinions, but also for their grace of diction. The quiet dignity of his courtroom and the ease and precision with which he presided over every case that came before him will long live in the memory of the lawyers who were privileged to practice before him.

There were many other judges in those days who were the equal of England's greatest. Judge George P. Andrews,

the unassuming, painstaking, accurate lawyer and delightful friend—Edward Patterson, afterwards Presiding Justice of the Appellate Division, in whose court it was a perfect joy to practice—Henry R. Beekman, the scholar—Morgan J. O'Brien, beloved by everyone, both as a Judge and as a Christian gentleman—John Proctor Clarke, now Presiding Justice of the Appellate Division and in the days when he held trial term, surpassed by none—Victor J. Dowling, one of the most intelligent and retentive minds I have ever come in contact with—Francis M. Scott, a man of strong prejudices and tenacious opinions, but a clear-sighted, painstaking lawyer, and ranked high as a judge—the fearless Presiding Justice Van Brunt and many others.

In the olden days all these judges used to hold trial terms and preside over juries. By what seems to me a most unfortunate change in the Constitution, a branch of the Supreme Court designated as an Appellate Division was created, with a separate court on 25th Street, far removed from the regular court house and existing for the sole purpose of hearing appeals. Formerly the General Term of the Supreme Court used to hear these appeals and held court in the regular court house, always in close touch with the jury parts, and presided over by judges who often alternated between the trial work of the courts and the appellate terms. Since the amendment to the Constitution the judges of the Appellate Division devote themselves entirely to appeal work and never go near a trial court room. When this higher court was established, seven of our best trial judges were ap-

pointed to it, and ever since, as fast as these judges die or retire, some new judge, who is beginning to make a name for himself in trial work before juries, is sure to take his place and our juries know him no more.

A recent instance of this lamentable system was the designation, by the Governor, of Mr. Justice John V. McAvoy to the Appellate Division. This was a serious blow to trial lawyers and to litigants as well, as Judge McAvoy was making a great name for himself both in the civil and criminal courts. This practice has a double defect. It robs the trial courts of their best material. At the same time it must necessarily more or less tend to warp the minds of the judges who pass upon cases, year after year, solely on the printed records of the court proceedings below, which at best cannot convey in type the atmosphere of the trial, so necessary to any accurate appreciation of the influences that brought about the verdict of the jury which it is sought to set aside on appeal.

Some of the Appellate Judges have admitted to me that they feel this defect keenly themselves, and one upstate judge told me that he tried to leave the appellate court and resume his duties in the trial courts every now and again, so that he might keep in touch with the every day court life and better equip himself for his duties when sitting as an appellate judge.

All this may seem somewhat of a digression unless one realizes, as every experienced lawyer surely does, the supreme importance of having judges of long experience preside over

our jury trials, giving the jury the benefit of their wisdom and guiding them to correct performance of their duties. I am not criticising the younger, newer judges; they are conscientious, painstaking men. But it takes years and years of experience on the Bench to acquire that subtle something which permeates the entire courtroom and impresses all present with the dignity and importance of the proceedings; which inspires witnesses, jurors and even the lawyers themselves to put forth their best efforts toward an orderly and speedy development of the facts and solution of the issues in dispute; and which enables a jury to arrive at a sane, common sense, intelligent verdict. Everybody is delighted with the result, but only the initiated realize that his Honor, the judge, has brought the whole thing about. When one of these judges is taken from the trial terms and "promoted" to appeal work, and some new judge is elected to take his place, it must necessarily lower the general average of our trial judges with the consequent effect upon juries and the institution of trial by jury.

By something like a system of rotation, litigants would experience the benefits the older judges could ensure them on the first hearing of their cases before juries, and on the other hand, the newly elected judges could not fail to profit greatly by the association, in the Appellate Court, with their more experienced fellow judges while hearing cases argued on appeal. Thus not only the judges but the general public would reap the benefits of such a system. It is useful to note, in this connection, that Mr. Justice Barrett, one of

our most experienced trial judges, after sitting for a number of years in the Appellate Courts, requested to be transferred to the trial term, stating as his reason that, quite apart from the arduous duties of the higher court which were proving a strain upon a man of his years, he felt that the appellate judges owed it to themselves and the public to resume their jury duties every few years.

CHAPTER VIII

THE VERDICT

MANY years ago when I was serving an apprenticeship in the Corporation Counsel's office and defending the City of New York in the ordinary damage cases that are heard before juries, the Clerk of the old Superior Court, the elder Mr. Boesé, used to take me into his private office, where, because of the peculiar construction of the large courthouse windows, it was possible to hear the deliberations of the jury in the room above. It was because of my semi-official position that I was accorded this privilege, and it was a great education.

On one occasion I had just finished trying a case where a young woman had fallen on a sidewalk which was out of repair and had sued the city for her injuries resulting from the fall. I could plainly hear the foreman of the jury start the discussion by saying, "Now, gentlemen, before we consider the evidence, there are some important questions of law for us to decide." Thereupon a loud voice called out, apparently from the far corner of the jury room, "Oh, to hell with the law! How much shall we give the girl?"

In a personal injury case I tried in the New York Supreme Court a few years ago the jury returned a verdict for the plaintiff for \$10,000. The trial judge set the verdict aside

as against the evidence and founded upon perjury. The next day all the plaintiff's witnesses were indicted by the grand jury for perjury. We lawyers for the defendants sought an interview with one of the jurors to ascertain how they came to such a verdict. This was the juror's reply: "We didn't believe the witnesses on either side, so we made up our minds to disregard all the evidence *and decide the case on its merits.*"

It is just such occurrences as these that have brought down an avalanche of criticism upon the whole jury system. One seldom meets any one that has had anything to do with the courts who has not some similar story to tell which he has heard at second or third hand. Nobody pretends to deny that occasionally the verdicts of juries afford the most grotesque proof of their failure to grasp the meaning of the questions that have been submitted to them for decision. But the jury system is not the only useful governmental institution that occasionally falls short of its proper function. Take it all in all, year after year, I am convinced from my own long experience with juries, that their verdicts come surprisingly near hitting the mark in the great majority of cases. They bring to the aid of the court untechnical, fresh and original conceptions of justice and right, which exercise a constant corrective influence upon the routine of our courts. Mr. Justice Morschauser, after nearly twenty years on our Supreme Court Bench, told me that he found as a general rule, and almost invariably, when the jury understands the case they render a proper verdict. If juries had

not habitually reflected the common opinions and feelings of men, the institution would never have survived so long and so triumphantly as it has done.

When the jurors retire to the jury room, it is for the purpose of *agreeing* upon a verdict if they can. They sit around a long table and the foreman naturally becomes the chairman and spokesman. There can be no feeling of jealousy over his selection, because he became foreman by chance; his name happened to be the first one taken out of the ballot wheel, and by taking the first seat in the jury box he became automatically foreman of the jury.

Many juries start their deliberations by taking a ballot to see how they stand. I think this is a serious mistake. As soon as the result of the ballot is announced the jurors naturally take sides at once. Men do not lose any of their human characteristics simply by taking the oath as jurors. An opinion once formed and expressed to others is adhered to just as tenaciously in the jury room as in any other gathering of men. One juror may be barely convinced; another may be fully satisfied. The degrees of persuasion may differ in intensity. Hence, if a ballot is to be taken early, it is far better that it should be a secret one. While it might appear that the jury were at the start equally divided, yet *who* the six were on either side would not be apparent. How are you going to bring the other six round to your way of thinking? Obviously, only by a most temperate discussion of the points of difference. Any loud talk or haranguing only postpones the probability as well as the hour of agreement.

Make friends with the jurors who differ with you instead of antagonizing them. Compare your views with theirs. Let them realize that you appreciate they are as fully entitled to their opinions as you are to yours and that you want to agree with them if they can point out to you your own error. Nothing is more fatal to an agreement than an assertion of one's pride of opinion, except perhaps a show of ill temper or ridicule toward the opposition or an attempt at coercion of any kind. One man is as likely to be mistaken as his neighbor. Listen to the others and they, in turn, will listen to you. Remember that lawyers and even judges themselves come to opposite conclusions on questions of law. Is it any wonder that jurors draw different conclusions from the same state of facts? What any particular witness has sworn to may, in the mind of one man, prove one thing; to the comprehension of another man, quite the contrary. General observation and experience are important elements to aid you in the discharge of your duties.

First and foremost, aim at probability; absolute certainty is among the unattainable things in law as well as in most other matters. If, therefore, the preponderance of evidence seems apparent, a mere doubt, in civil cases at least, should not be allowed to spoil an agreement on a verdict. Everyone is governed in the affairs of life by opinion, experience and *probability*.

Judge Donovan in one of his clever books on jury trials said, "Jurymen are all human; they carry their prejudices into the jury box just as surely as they carry their arms and

legs. Some are hardened by their own ill luck and contempt for their fellowmen and hate to see anybody succeed in life. Some are completely lacking in the milk of human kindness; others are generous, humane, open-hearted, open-minded; some intelligent, others stupid. Laboring men prefer their own kind. Men of common nationality will to some extent stick together. Farmers side with farmers. Railroad men are naturally prejudiced against those who attack railroads. Germans are stubborn but generous. An Irishman is often prejudiced against a Jew and vice versa."

If you try to keep these more or less obvious truths in mind, you will be likely to approach your fellow jurors with more success in your effort to reach unanimity. I should like to have large placards printed and hung conspicuously in every jury room in the country. These would be inscriptions taken from one of the oldest of law books:

"One eye witness is better than two ear ones."

"Plaintiff must recover on his own strength, not on his opponent's weakness."

"Where the number of witnesses is equal on both sides, the most worthy are to be believed."

"In criminal cases the proof ought to be as clear as light."

"He who spares the guilty punishes the innocent."

One useful rule of law that every jurymen would do well to remember is that fair inferences from evidence, founded upon the natural course of business and of human experience, are as truly evidence as are the principal facts from which these deductions flow. As such they may properly be con-

sidered by a jury. On the other hand, there are certain things a juror should avoid. If a juror happens to have any personal knowledge of either of the parties in interest or of the character of any of the witnesses, he is false to his oath if he communicates this knowledge to his fellow jurors, or even takes it into consideration himself.

An amusing story is told by Frederick Trevor Hill in "Lincoln the Lawyer." A lawyer challenged a juror because of his personal acquaintance with Abraham Lincoln, who appeared for the other side. Such an objection was regarded more or less as a reflection upon the honor of an attorney in those days, and Judge Davis, who was presiding, promptly disallowed the challenge. But when Lincoln rose to examine the jury he gravely followed his adversary's lead and began to ask the talesmen whether they were acquainted with his opponent. After two or three had answered in the affirmative, the judge interrupted. "Now, Mr. Lincoln," said he, "you are wasting time. The mere fact that a juror knows your opponent does not disqualify him." "No, your Honor," responded Lincoln, dryly. "But I am afraid some of the gentlemen may *not* know him, which would place me at a disadvantage."

Judge Harley N. Crosby, of our State Supreme Court, told me of an amusing experience he once had with a jury in a case he tried some years ago, before he went on the Bench. He represented the defendant in a suit brought for the purchase price of an engine to run a threshing machine.

"I felt fairly confident of victory. My opponent was a lawyer of great ability and resourcefulness, and during an intermission in the trial I could not resist the temptation to tease him. I said to him, 'I not only have you beaten on the law and the facts in this case, but I also have some advantage with the jury, for I am on intimate and friendly terms with *all but one* of them.' My opponent made no reply, but when he summed up the case he talked for fully an hour and never once mentioned the case or any fact about it. He summed *me* up in the most glowing terms. He told the jury how many times he had been beaten by me, what a splendid fellow I was, what a splendid Surrogate of the county I had been for many years, and pleaded with them not to give me a victory just because I was such a good fellow.

"The jury retired about 5 o'clock P. M. and did not return with a verdict until 2:30 the next morning. They brought in a verdict for the plaintiff for the full amount claimed. I sought out the jurymen I knew best and asked them how they reached the conclusion. He said, with a show of much feeling, 'By thunder, we are going to show you that you can't always win cases just because you are a good fellow.' I asked him then who hung the jury for seven hours and a half and his answer was, 'That darn fool from the Town Line Road, the only one of us who *didn't* know you!' Judgment was reversed upon appeal and the case was later tried before a jury not one of whom I knew. That jury brought in a verdict in my favor in less than five minutes."

Another thing that is fatal to sound reasoning and just

verdicts is any prejudice or bias which finds its way into the jury room. Anyone with a strong prejudice necessarily becomes unfitted to form an impartial judgment; neither can he reason correctly. Such prejudice, if discovered in time, of course excuses the juror from serving in the case. If it develops during the trial, he should endeavor to dismiss it from his mind, provided he respects his oath and wishes to be guided in his decision by the evidence and by nothing else.

It is often said, partially in jest, that where a woman is concerned in a case against a corporation or even against the opposite sex, there is no such thing as a fair-minded jury. In such cases juries often seem to bid adieu to all common sense. The tears of a goodlooking woman seem to efface all arguments of counsel and all suggestion of reason. However absurd and incredible her story may be, a fainting fit at an appropriate moment serves to blind some jurors' minds to all the glaring improbabilities of a pretty woman's testimony. Who can suggest a remedy for this phase of man's nature, which he necessarily takes into a jury box along with his other attributes? In several states, as is commonly known, women are now accepted as jurors. That certainly should have a tendency to lessen the prevalence of sympathetic verdicts in favor of feminine litigants. This I think I may state without cynicism.

Apropos of the rule allowing women to serve on juries, I am reminded of a case recently tried before Judge J. Whitaker Thompson in the United States District Court in

Philadelphia. A Mrs. Ware had, with the other jurors, signed a verdict in favor of the defendant railroad company in a damage suit brought by the heirs of four grade crossing victims. The verdict was "sealed" and the jurors went home. The next morning, before the Judge could open the envelope containing the sealed verdict, Mrs. Ware startled the court by declaring that she had *changed her mind*. Judge Thompson held that the original verdict must be filed, but also ruled that the lawyer for the plaintiff should be allowed to file a motion to have it set aside. This may well be called a "leading case" on the subject. It certainly presents a new and perhaps rather serious complication of the whole question of jury service by women.

A case unique even in the annals of French criminal courts occurred last February. A woman who killed the man that jilted her was not only acquitted, but received a purse from the jury. Marie Du Bot de Talhouet, of an impoverished family of the highest Breton nobility, admitted she had killed a Greek business man named Basilondes because he abandoned her after they had lived together twenty years. She was paralyzed in one arm and deaf. She pleaded that the man had left her to starve. The jury gave her 300 francs, to which her lawyer added another hundred.

Judge Thompson wrote me a letter on the subject of women as jurors, which I have his permission to quote. He says:

"Shortly after the constitutional amendment qualified women to serve as jurors in Pennsylvania, I sat in a case in

which a dignified, elderly attorney represented the plaintiff. Against him, for the defendant, was pitted a young member of the Bar who constantly interjected comments during the examination of the witnesses, which were uncomplimentary and disrespectful to the older lawyer. After hearing the plaintiff's testimony I entered a non-suit. When the jurors were discharged for the term, the lady who had served on the case, and whom I knew, met me in the corridor, and said:

"Judge, it was fortunate for the defendant that you decided the case in his favor. The five women on the jury were all against him because of the horrid, "fresh" manner of his attorney toward the nice old gentleman on the other side of the case, and, besides, *he looked like a fish!*"

"I was about to form the opinion that women jurors would not be guided by the evidence as men would, when a prosperous business man whom I knew dropped in to see me and told me of an experience he had had some years earlier upon a jury in one of the County Courts. It was a criminal case, the first case of the term, and the Commonwealth was represented by a new Assistant District Attorney. The man told with some pride how he had influenced the verdict. Ten of the jurors had expressed themselves in favor of acquittal because they were not satisfied with the sufficiency of the evidence. He had not spoken up to that time and, when the foreman asked his views, he stated them as follows:

“‘Mr. Foreman, this is the first case of the term. It was prepared with considerable expense to the county and considerable labor on the part of the new Assistant District Attorney, and it is the first case in which he has appeared as prosecutor. Now, what encouragement will it be to this young District Attorney if he loses his first case after all that expense and labor? I think under the circumstances we should encourage him by giving him a verdict of guilty.’

“His generous attitude toward the prosecutor was approved by the other eleven jurors and a verdict of guilty was returned. I revised my judgment that sex had anything to do with the qualifications of jurors.”

“In another case a juror, highly esteemed for sagacity in his own community, who had even held many town offices and had been in both houses of the legislature, served in a criminal case where there was a disagreement, eight voting for conviction and four for acquittal. When asked to explain the disagreement he made this astonishing reply:

“Those four fellows wouldn’t listen to reason. I told them when the doctor was arrested he was put under \$10,000. bail, and that was pretty conclusive that he was guilty. No man would be required to give that amount of bail if he were not guilty, but we couldn’t convince them and so there was a disagreement.”

Juries have a disposition to render excessive verdicts against corporations in personal injury cases, but fortunately

these can always be reviewed on appeal. If jurymen would only realize that an excessive verdict will be set aside by a higher court, which means that the time spent by the court and by all concerned has been wasted, some of the more level-headed among them ought to be able to control the others' exaggerated notions as to damages.

In a case in Illinois, *Walker v. Martin*, the jury gave a verdict for \$25,000 against a rich defendant for a malicious arrest of a poor man, where the injury was a brief detention and an additional stain on a not unblemished reputation. In setting aside the verdict the court used this language:

"This verdict is unprecedented in the annals of judicial proceedings. It bears upon its face the stamp of prejudice, partiality, and oppression, and ought not to remain on our records. Such verdicts as this outrage that sense of justice which has a lodgment in every well regulated mind, and if sustained by this court, could not but tend to increase that tide of opposition to the jury system which is now rising and advancing in more than one state of this Union. If sustained, juries will be regarded as instruments of oppression rather than a bulwark of our liberties."

Only the other day in Queens County a Porto Rican, named Emanuel Revero obtained from a jury a verdict of \$68,000 for the loss of one leg. He sued The Ninety-two Bleeker Street Corporation, which was the owner of the building and had control of the elevator shaft through which the plaintiff fell, sustaining injuries that necessitated the

amputation of his leg. In a case tried *without* a jury before Mr. Justice Wasservogel in our Supreme Court about a month ago, the judge awarded a verdict for \$46,752 to a man by the name of Baumblatt whose leg was crushed and permanently crippled by the defendant's automobile, which ran up on the sidewalk at Lexington Avenue and 61st Street.

Such verdicts were entirely unknown in our courts until very recent years, and there would seem to be slight probability of their being upheld on appeal. Usually when juries award such verdicts everybody abuses the jury system and claims the verdict was the result of prejudice and passion. Certainly no one would accuse Justice Wasservogel of any such influence. It is the spirit of the times apparently to think in big figures, and it is perfectly true that the purchasing power of the dollar has greatly declined.

I was talking with a man the other day who told me that he had served on juries conscientiously every other year for something like twenty years and that he usually found there were one or two jurors who tried to sway the others to their way of thinking. Finally everybody would be in such a hurry to get back to his business or home to his dinner that all would follow the leaders and agree upon the verdict they urged. He did say, however, by way of mitigation, that he found his service on juries to be highly educational and enjoyable. For such jurors as these I would recommend placing two more placards in the jury rooms and throwing a strong light upon them:

"The hungry judges soon a sentence sign
 And wretches hang, that jurymen may dine."
The Rape of the Lock, by Pope.

and

"He that complies against his will
 Is of his own opinion still;
 Which he may adhere to, yet disown,
 For reasons to himself best known."
Hudibras, canto III, by Butler.

Juries sometime agree to "toss up" or draw lots or resort to some other chance method to avoid a disagreement and get home to their families, or with some other equally worthy motive. If they disagree about the amount of their verdict, each writes on a slip of paper his own figure, and these are added together and divided by twelve. I need hardly point out the impropriety of any such conduct, and if it became known to the trial judge it would not only upset the verdict but subject the jurors to fines for contempt of court. It is the intent of the law that a verdict shall be the result of intelligent discussion, and it is regarded as most reprehensible conduct when jurors so far forget their duties and the responsibility resting upon them as to resort to some mode of determining a verdict by chance. They should always take care that their verdicts should not be open to a comment like that made by a well known wit concerning Prohibition. When asked his opinion as to its genuineness, he replied:

"Prohibition may be the voice of the American people, but it will never be their breath!"

In some states, where the right to a jury can be waived and both the facts and the law can thus be decided by a judge, the number of civil cases tried by juries is constantly declining. In some states even the majority of cases that can be tried by juries are submitted to the judges instead. In Louisiana, I am told, very few cases are submitted to the vagaries of a jury. The same thing happens in England. Over a million civil cases are tried in England each year and not one in a thousand is tried by a jury, although any matter involving at least the sum of five pounds can be tried by a jury.

Conversation in reference to the case with the officer in charge of a jury constitutes misconduct in a jury and will often vitiate the verdict; indeed, if any important information has been received outside of that obtained during the trial, the verdict will be set aside. Judge Arthur T. Tuttle, of the United States District Court, Eastern District of Michigan, told me not long ago of an experience he had with a new bailiff of his court, growing out of one of the so-called white slave cases. He had charged the jury in a manner which he thought was plain, adequate and proper. The bailiff, whose name was Tom, had been in service only a short time. The usual oath was administered to him and the jury were placed in his charge. They had been out only a few minutes when Tom came to him with the statement, "Your Honor, the jury couldn't understand that charge of yours. They were talking with me about it and I gave them a pamphlet I had explaining this here white slave law. That was the right thing for me to do wasn't it?" The judge

replied, "Why, Tom, don't you remember the oath you just took—that you would not communicate with them yourself nor permit anyone else to do so, except to ask them if they had agreed upon a verdict? You go and get that pamphlet at once and bring it to me."

In about half a minute poor old Tom came hurrying back with the pamphlet. It was a little sheet issued by the Department of Justice to United States Attorneys and others, outlining the policy of the Department and advising the use of the law only in cases of commercialized vice or where the woman in the case was very young, or some flagrant and unusual wrong had been done. As Tom handed this circular to the judge, he pointed to the first five words appearing in bold type at the beginning of the article and said, "You can see right there it says, 'To whom it may concern' and I thought this surely would concern the jury." While the judge lectured him severely as to his duty and cautioned him carefully as to the future, he admitted to himself that the green bailiff had a pretty good defense.

Some jurors think it smart, when they are in a minority and want to have their way, to persuade the majority to an extreme verdict, which they feel sure will be set aside by the judge, giving them their way in the end. I remember once representing an individual defendant who was sued jointly with a corporation, and after the verdict several of the jurymen told me they voted in my favor, but as there were others who wanted to hold *both* defendants they finally yielded. But they said, "We made the verdict so very big

that we felt sure it would be set aside on appeal." Unfortunately, however, it was not.

Chesterton in his essay on "The Twelve" says:

"The trend of our epoch up to the present time has been consistently toward professionalism. We tend to trained soldiers because they fight better; trained singers because they sing better; trained dancers because they dance better; and so on and so on. Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge.

"There should be taught to every infant, prattling at his mother's knee, the following: that the more a man looks at a thing the less he can see it, and the more a man learns a thing the less he knows it. The argument of the expert that the man who is trained should be the man who is trusted would be absolutely unanswerable, if it were really true that the man who studied a thing and practiced it every day went on seeing more and more of its significance—but he doesn't; he goes on seeing less and less of its significance. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good); not that they are stupid (several of them are quite intelligent); it is simply that they have got used to it.

"Civilization has decided, and very justly decided, that the determining of the guilt or innocence of men is too important to be trusted to trained men. It asks for other men who know no more than I do, but who can feel the things

that I feel in a jury box. When it wants a library catalog, or the solar system discovered, it uses up its specialists, but when it wishes anything done, which is really serious, it collects twelve of the ordinary men standing around. The same thing was done, if I remember right, by the Founder of Christianity."

Judge John E. Keller of the Supreme Court of the State of Connecticut, in his address before the State Bar Association of Connecticut, put this same idea in what he calls a "homelier" way:

"A friend of mine had a sickly child whose physician prescribed a diet mostly of milk. The father had a prized Ayrshire heifer of approved lineage, and he fed the child with her milk, but without good results. He then procured from a neighbor milk from a Jersey cow of distinguished pedigree, but the youngster did not improve. The matter was again referred to the doctor who said, 'Get milk from a young red cow.' This was done and the little one improved at once and thrived mightily.

"Moral: The judicial process needs an infusion of the common thought and feeling of the community to achieve the best results. As Professor Robinson has put it, 'The still small voice of the herd is bound to make itself felt. In one way it becomes felt through articulation; so just as truly, perhaps in a less degree, it exerts power through the petit jury.'"

For the last four centuries there has been a sanctity and foreordained character about the number twelve. Be it

twelve Apostles, or the twelve tribes of Israel, the twelve Patriarchs, the twelve officers of Solomon, the twelve judges in the old time Exchequer Chambers, the twelve Counsellors of State or the twelve good men and true of the jury—the idea of unanimity of the twelve has persisted through generations and must have substantial reasons to back it.

Ever since 1730 there have been repeated efforts to change the rule that all twelve must agree or there is no verdict. In those days, however, the jury often had to undergo a greater punishment than the criminal himself. They were confined in one room without meat, drink, fire or candle, till they agreed or starved. Mr. Emlyn, in his preface to the second edition of Howell's *State Trials*, said:

“It would be pretty hard to assign any tolerable reason for this usage: if it has seldom or never happened I am afraid it has sometimes been prevented only by the unjust compliances of some of the jurors against their own consciences. For however plain some cases may be, others there are wherein they cannot avoid differing in their judgments; nor do they deserve any censure for so doing; many men, many minds; all can't see things in the same light. To what end therefore are they to be restrained in this manner? It may indeed force them to an outward seeming agreement against the dictates of their consciences; but can never be a means of informing their judgment, or convincing their understanding. I have known when a juror, being afterward asked how he could join in such an unjust verdict, could give no better reason for it than that the others were of that

opinion; which, I fear, is the best reason a great many are able to give. If it be said, that otherwise one stubborn juror may stand it out against all the rest, even contrary to the convictions of his own mind, it is very true he may do so; and if his body be as stubborn as his mind, starve them out too. But why then is his voice regarded? Why can't the others give a sufficient verdict without him? Or, if a man must not be convicted without the agreement of all, why then is not the prisoner acquitted, when they can't all agree? But why must the jurors be compelled to an agreement one way or the other? After all, a forced agreement (as all agreements procured by restraint are) is no better than none. If the consent of him, who stands it out against the rest be of any regard, it ought to be free; if of none, then why can't a verdict be given without it? If twelve must agree, the better way would be to have twenty-three on a jury, and the verdict be given by the majority; for sure 'tis an odd way of deciding a cause, that it should be left to the determination of him who can fast the longest. But suppose it should be thought requisite that two-thirds should be of a mind and if so many could agree to find the prisoner guilty, he could be convicted; and if they did not, he should be acquitted: would not this be a sufficient security for innocence? Surely it would be much better to make a provision of non-agreement, than by forcible methods to extort the appearance of one; for it is the same thing to the prisoner whether he be convicted without the concurrence of all, or by a concurrence which is not sincere but forced."

Everyone knows that our present day juries are not starved or frozen into an agreement. In important cases they are kept together for a reasonable length of time, and when it becomes apparent that they cannot reach an agreement, they are discharged and a mistrial is the result.

Only within the last week a case came to my notice in this county where, after a four day trial, the jury were locked up until midnight without food or drink. The next morning it was discovered that all the chairs in the jury room had been broken during the dispute and that they never would have been able to agree. A Jew was suing a Christian and the seven Jews stood out together against the five Christians, although the evidence was pretty much all one way. This happens so often in our local courts that sooner or later it is likely to prove a very serious stumbling block to the continuation of the jury system in this locality. As a rule Hebrews make keenly intelligent jurymen. They consider it an honor to serve on juries and seldom present excuses to the judge. But in cases where a Jew is opposed to a Christian, prejudice seems to take the place of reason as well as of conscience. It leads one to speculate whether, after all, the Jews realize that if they continue their race prejudice even when acting as trusted officers of our courts, they will defeat their own ends and compel attorneys to waive all jury trials where Hebrews are concerned and submit such cases to a single judge.

I was told a story recently about a case where the Judge was Jewish and there were Jewish lawyers on both sides. The

matter in dispute was kosher delicatessen, the plaintiff and defendant were both Jews and there were ten Jewish jurors and only two Gentiles—one Irishman and one German. After the jury retired, the Irishman called out to the German, "Come on over here, Hans; this is none of our business. Let them fight it out among themselves." And the ten "experts" decided the case.

In some states a verdict of nine of the jury in civil cases has been provided for. This has been the law for some time in Arizona, California, and Idaho. Other western states either have already passed such a law or the legislatures have been authorized to enact laws to the same effect. In Italy and Norway even in criminal cases a majority may convict. In Scotland a verdict by three-fourths of the jury has long been permitted. The English people, however, have never seen fit to follow the Scottish example.

The greatest objection to the rejection of the rule of unanimity, and the adoption of the alternative of a two-thirds or three-fourths majority, is the almost unavoidable danger of hasty and unjust verdicts. It usually happens that when a jury first retires it finds that there is a substantial majority on one side or the other,—with the most intelligent, clear thinkers in the minority. It is only by means of a frank discussion with these better equipped minds that the majority can be won over to a proper verdict. Had the majority ruled in the first instance no such discussion and no such result would have been possible. Before the discussion all prejudices, be they racial or otherwise, will be found con-

stituting the majority; and if the safeguard which lies in the rule of unanimity could be broken down at once by a majority vote, the greatest injustice would often result. A verdict of twelve always has and always will be accepted with much more equanimity and better grace than what is called a "split" jury. Judge Pitman, one of Massachusetts' best judges, in addressing a jury as to their general duties, said:

"Gentlemen, there may be large cases, and there may be small; some five dollars, and some five thousand dollars. But the law does not presume that, however difficult a case may be, a jury is not to agree, keeping the parties in misery, and supporting an army of lawyers during their natural lives. You come here to agree and settle the case in which the parties are in dispute."

In speaking on this subject Mr. Choate once said, "I can conceive of no more destructive and fatal weapon, which one's adversaries could secure in advance, than the abolition of this rule of unanimity, excluding practically the votes of the more conservative, the more deliberate, the more just members of the tribunal."

The statistics show that only about three or four per cent. of jury trials end in disagreement. In difficult or doubtful cases a disagreement is often, from the very nature of things, not only inevitable but a distinct advantage. Time and again I have seen litigants eager for their day in court and their opportunity to vent their spleen. But after the jury have announced their inability to agree upon a verdict in

favor of either side, they gradually quiet down to a more rational view of the whole dispute, and a fair compromise quickly results. Even when the jurors themselves reach a "compromise verdict," which pleases neither litigant at the time, yet afterwards it may turn out to have been an exceedingly common sense solution of the difficulty.

Some ten or twelve years ago a case was tried before U. S. Circuit Judge John C. Rose in Maryland, which lasted about two weeks. The amount involved was about \$3,500. A machine, a part of an electrical installation, had broken down. The plaintiff was the contractor who installed it and the defendant had insisted that he should replace it with another. A conference to settle the controversy was held. There were nine persons present; four of them testified that the plaintiff had agreed to make the replacement at its expense; five swore that if certain engineers said the breaking down of the machine was the result of bad usage, the re-installation should be at the defendant's expenses, and the engineers so said.

Just before the jury retired to consider their verdict, the court and counsel on both sides agreed in telling the jury that their verdict must be for the defendant or for the plaintiff for \$3,500.00, with or without interest, in their discretion. The jury was an exceptionally high class one, containing at least half a dozen men who were not only fitted to be, but were, directors or officers of great corporations, or the heads of large business establishments. It was very hot summer weather. They remained out some hours and towards six

o'clock in the evening the judge was about to go home and sent word to them to know whether they had any communication to make. In reply he received a note from the foreman, asking him if he would accept a compromised verdict. The judge answered that he supposed he would have to receive any verdict they brought in, but if it was one that was logically inconsistent with any theory of the testimony, it would have to be set aside. In five minutes they were back with a verdict for the plaintiff for \$1,000.00.

After the event, some of them explained to the judge personally that they understood the absurdity of the verdict as well as he did, but that if business men, such as the plaintiff and defendant were, chose to make unwritten agreements in town meetings, they would have to get out of the resulting controversy the best way they could. At all events, he said, some of the jurymen had dinner engagements that evening, one was the father of a very recently born child, his first, and all of them made up their minds that they were not going to be locked up through a hot summer night to get either the plaintiff or defendant out of the hole which they had made for themselves.

Both sides made motions for a new trial. The judge was going away for his summer vacation and he postponed the consideration of the motions until his return. When he got back, the plaintiff had cooled off and dismissed his motion. The defendant persisted with his "for the vindication of his character," he having been one of the witnesses who testified for his side. After much consideration and great doubt the

judge came to pretty much the same conclusion that the jury had, and thought there was not much to be gained by granting a new trial, the result of which would be little better than a lottery, and so the verdict was allowed to stand. About ten years later, the prominent citizen who was so anxious that his word should not be impugned, turned out to have put \$125,000 of forged paper into the bank of which he was president and to have been guilty of all sorts of breaches of trust. Perhaps the jury was not so far wrong, after all.

One of the most inane jury verdicts that ever came to my attention was in a case where the judge had persuaded the jury by the most earnest exhortations to acquit the prisoner. This the jury accordingly did, but they appended to their verdict "the hope that his lordship would take pains to see that the prisoner *was severely punished!*"

To return, for a moment, to the days when we used to listen to the deliberation of our juries through the courtesy of Chief Clerk Boesé. On one occasion a leading lawyer happened to come into the clerk's office after the trial of a very important case which he had just finished. The jury had gone out and were discussing the trial in the room above. Mr. Boesé asked his friend if he would like to listen for a moment to the deliberation of his jury. The lawyer stepped over to the window. Pretty soon some jurymen exclaimed: "I tell you that lawyer for the plaintiff is what I call a smart man," whereupon the lawyer turned to Mr. Boesé with a smile on his face and remarked that the experience was not

only instructive but rather pleasing as well. A moment later, however, another jurymen shouted out: "What did you say about the plaintiff's lawyer? Did you say he was smart? Well, I don't know so much about that; but he *thinks* he is smart, all right, all right!"

Now and again, it is the experience of nearly every juror to serve on some case where there is one man who refuses to agree with *anyone*. He is a veritable grasshopper in the milk. The clerks of the different courts usually discover, through the other members of the panel, the identity of the obstinate juror and he is reported to the judge and excused from further jury duty. Some lawyers are prone to accuse such jurors as having been bought by the other side, and even the leaders of the bar occasionally fall into this error.

Some years ago William M. Evarts had been retained by the Government to prosecute the so-called Ribbon Fraud Cases, where the Government had been defrauded out of duties amounting to many millions of dollars by importers of ribbons. One case was being tried as a test case. After a long trial, the jury having been out all night, Evarts learned from a court officer that the jury were going to announce their inability to agree, standing *eleven to one*. At the opening of court, when the jury were seated, Evarts arose and addressed the court to the effect that this was a very important case to the Government; that he was informed the jury had disagreed and stood eleven to one; that it was a case where all the importers of ribbons in the city were interested and it was evident that the jury had been

tampered with and that the defendants had succeeded in reaching one juror. He thought it was the duty of the court to make inquiries of the jury before dismissing them so as to ascertain the name and address of the delinquent juror. With this the foreman of the jury arose and said, "If your Honor please, I was the delinquent juryman. I held out all night for a verdict of conviction, *but the other eleven men wanted to acquit!*"

It is amusingly said sometimes by those who advocate the substitution of a single judge for the twelve men on the jury that at least there would be the comfort of knowing that the judge could not very well disagree with himself. But I am told that is not true; that many a time where the judge has been the arbiter of the facts, he has wanted very much to disagree with himself. One eminent judge certainly accomplished this, when after long consideration, he returned the papers filed in a case tried by him with the endorsement that *sufficient* evidence had not been produced at the hearing to justify a decision either way. And some judges make it a practice to refuse to permit litigants before them to waive the requirement of a jury.

In his "Impressions of an Average Juryman," Mr. Sutcliffe gives the following description of the first few minutes after a jury retires for deliberation:

"Have you ever been near a menagerie when something has happened to excite the animals? If so, you heard a heterogeneous volume of sound made up of everything from the roar of the lion and the grunt of the hippo to the squeal

of the guinea pigs. That is about what you would hear if you stood outside of a jury room while they are deliberating, for they deliberate out loud—with the accent on the loud. And if there is not a foreman present who can control excited men, they act pretty much as do the inhabitants of the menagerie. All twelve try to talk at once and sometimes eleven of them will try to drive home an argument, at the same time, with an obstinate twelfth. Acrimonious conversation, to be polite in my description, is common, and even a fistic encounter is promised. Remarks of a personal nature pass freely, and one standing within hearing, and not familiar with jury room performances, would think that a general rough and tumble fight was under way.

“But, bless your heart, that is only their way of arriving at a verdict. Animal activities soon wear themselves out. The lion and the lamb lie down together; offensive remarks are forgotten; the punches fall short; and they file into the court room with their verdict, in perfect harmony. Perhaps the judge compliments them upon their expertness in handling the business at hand.”

CHAPTER IX

SOME SUGGESTED REMEDIES

Probably one of the best informed men in the world on the subject of crime and criminal trials is Charles Kingston of England. However that may be, one thing is certain; nobody else can write such absorbing books on the subject. When he heard that I was engaged in writing a book addressed primarily to jurymen, he sent me a letter in which he said: "I consider the jury system the greatest democratic institution invented by man. And if you can help to overcome the repugnance of the American citizen to serve on juries, the country ought to spend one per cent. of the money thus saved in erecting a golden statue to you, and surely I need not emphasize the vast amount of time saved or the strengthening of the hands of justice."

I doubt if there is a single practicing lawyer at our Bar who would not gladly do anything in his power toward persuading the better class of our citizens to serve on our juries. No one who gives the matter a moment's serious thought can find any fault with the jury system as such. It is the personnel of our juries that makes possible the verdicts which underlie and give rise to all the adverse criticism.

I take it that in the larger cities of this country—especially

in a city like New York—we have at the present writing the most ideal jury material the world has ever afforded. A city of six million live Americans, all vying with one another in a struggle for advancement, a battle of the survival of the fittest, the center of the business interests of the country—where the highest class of newspapers and magazines with a daily circulation running into the millions offer all the news of the world to their eager readers,—cannot fail to produce a most intelligent type of citizen, whose mind, experience and viewpoint are ever broadening into new channels of enlightened progress. If such individuals could only be persuaded or even forced to serve on our juries, we should have the ideal courts of the world.

Why is it that one finds so small a percentage of such men sitting on our juries? Why this widespread repugnance to jury duty? Are there no means at hand to obviate this unfortunate state of affairs? Can we not persuade our successful men to lend our courts the advantage of their broad business experience, and willingly give up two weeks of their time (ten days, to be exact, as there are no sessions on Saturdays), once in every two or three years, for the preservation of law and order in their city and the protection of the life and property of themselves and their neighbors?

One can very readily put his finger on the keystone of the difficulty, if he will turn to our law of exemption. A casual reading of this statute makes one wonder how it is there is anybody worth while in the city left to choose from, for quite half of the intelligent voters are exempted by law.

The following are exempted by the judicial laws for the State of New York: clergymen, physicians or surgeons, dentists, pharmacists, optometrists, veterinary surgeons, licensed embalmers, undertakers, lawyers, professors and teachers, editors, editorial writers, reporters, office holders, foreign consuls, captains, engineers, officers and pilots of vessels making regular trips, railroad superintendents, conductors and engineers (other than street railway), telegraph operators, grand jury or sheriff's jurors, members of the Old Guard or of the National Guard, a general or staff officer, members of the National Guard discharged after five years' service, persons honorably discharged from the military forces of the state after seven years' service, all veterans of the Civil War, veteran firemen after five years' service, persons physically incapacitated, firemen, policemen, and duly licensed engineers of steam boilers.

Repeal practically all these exemptions, excepting doctors and lawyers. Put all these names into the jury ballot wheel along with the others; the average intelligence will automatically rise fifty per cent. by this one act alone. When these men who have always had the privilege of exemption once find themselves serving on juries made up of this better class of citizens we are striving for, the fascination of the work will probably appeal to them to such an extent that they will very likely wonder "what's all the shouting for" about the jury system.

At the present writing, our local Commissioner of Jurors is directed to select five or six thousand of the very best

names on his list for what is called a "special panel." This list is confined to those who have willingly sacrificed their own personal convenience for the good of the jury system, have served on juries for years and have come to be known as experienced jurors. Unfortunately this experience they have attained is only available to litigants in special cases, those in which the judge may order a "special jury." The result of this practice is that only a very few hundred, or less than ten per cent. of these gentlemen, serve on any jury at all. During the year eighteen cases were tried with special jurors and two hundred and sixteen special jurors were impanelled and sat as such. The other four thousand seven hundred and eighty-four were idle.

This indefensible system could very readily be corrected, while preserving the "special list," from which jurors may be summoned for such particular occasions as the judges desire, by allowing these selected jurors to serve on the ordinary panel as well. If, by any chance, a juror summoned on a "special" case can show that he has already served his allotted term on the regular panel, let that fact excuse him. More than enough material will remain for the special occasion. This single reform will surprisingly enrich the general list of jurors. If on each panel of twelve, there are four or even two level-headed, experienced business men who have served on juries before, they will likely enough leaven the entire jury. By turning the discussion into proper channels they will help to bring about sane, common sense verdicts, quite apart from the fact that the greater the number of

first class men on each jury the more agreeable it is for all concerned.

Many other things suggest themselves to me that would make the juror's lot a happier one. In the first place, why summon a juror to be present in a calendar part of the court at ten o'clock "sharp"? The Clerk of the Court must know that the hearing of motions and the calling of calendars will occupy at least one hour to an hour and a half of the Court's time before any juror will be needed. This extra morning hour would be a very considerable help to a business man in mapping out the work of his office during his absence at Court. As the practice now prevails in each calendar part, fifty or more jurors are kept sitting aimlessly about in a crowded, stifling courtroom, with no earthly thing to do or think of but the hardship of jury duty or some available excuse to escape it.

By eleven o'clock, perhaps, some case is called for trial and twelve of the fifty are selected as jurors. What becomes of the other thirty-eight? Are they allowed to attend to their business? Not at all; they are "excused until two o'clock." They return promptly at two—though perhaps the judge is ten or fifteen minutes late—only to learn that the case on trial is unfinished, and will not be finished for a couple of days or more. Yet these unfortunate thirty-eight are ordered back at ten o'clock the next day, only to be excused until two o'clock—and then until the following morning and so on.

The theory of this practice is that the case on trial may

break down so that the jurors may be needed for another case, and if they are not on hand a few hours of the Court's time may be wasted. But if we are trying to induce business men to serve on our juries so as to raise the standard of our trials, what matters it if the court does, once in a long while, adjourn a few hours earlier than scheduled? What weight should we attach to that contingency, compared to the profound advantages of obtaining higher class juries? During the selection of a jury each lawyer has six peremptory challenges. He questions each juror closely to ascertain his prejudices and his position in life, in order to form some idea of his intelligence. The ignorant ones are usually discarded, and the twelve that remain are apt to be the pick of about twenty-four who have been examined.

When these twelve have rendered their verdict what does the clerk do? Does he put the names of these twelve picked men back in the ballot wheel and select the next jury? Not at all; he puts the names of those twelve good men and true on one side. It is the twelve or more ignoramuses that he puts back in the box to serve on a second jury, while the twelve intelligent men are left to sit idly around the courtroom or journey back to their offices and up to the court house again twice a day, until possibly two or three other cases have been tried and finished, when at last their names go back again into the general list. Nothing could do more to lower the general average of our everyday juries than this inexcusable practice.

In a courtroom nobody seems to care whether or not there

are seats even for the jurors waiting to be called for the next trial. It is a case of catch-as-catch-can. They find a seat wherever they can, often on the back benches mixed up with all sorts and conditions of people. After the seats are all occupied, they must stand out in the corridors. Why not have jury rooms where such men as are not wanted can at least have a resting place? There they can read or write, telephone to their places of business, do something—*anything*,—rather than sit in the back of that crowded courtroom, unable to hear even a word of what is going on, except when some deep-chested attorney begins to harangue a jury in a final effort to persuade them that things are not what they seem.

And what of the twelve men who were fortunate enough to be chosen to sit in the case, instead of on the back benches—what kind of quarters do they find when they retire to try to agree on a verdict? A tiny bare room just big enough for twelve men to sit around a table, without ventilation save for an entirely inadequate window, if perchance the weather will permit of its use. The stifling air in that diminutive room, fetid with tobacco smoke, would hardly seem at first glance to be conducive to deliberate discussion and patient comparison of ideas and opinions. All these things can be so easily remedied, if one can only find the proper person who has the interest and authority to order the changes. And yet everybody wishes we had a better class of jurors!

All juries work better if they feel the judge on the Bench

is working with them. This goes without saying. But when they see the judge writing letters to his friends while the witnesses are testifying, or talking with some political friend who has taken a seat beside him on the Bench, can any one blame a juror if he lets his thoughts wander back to the business he feels he is neglecting? If, when a lawyer objects to a question, the judge shows he has been paying so little attention to what is going on that he has to ask the court stenographer to read him the question from his notes so that he can learn what the objection is all about,—what shall we say of the example this affords to the jury?

Not long since, after one of these talks with a friend on the Bench, the learned judge during a pause in the proceedings turned to the lawyer for the defendant and said, "You may sum up, Mr.—" "Thanks, your Honor, but I have *finished* my summing up." "Oh," said the judge, "Well, then," turning to the lawyer for the plaintiff, "You may sum up, Mr.—" "Thanks, your Honor, but I have also finished my summing up." "Well," said the judge; "in that case, I will now charge the jury."

And people complain of our jury system!

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